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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No.

LAMARR BADONI, et al.,

Petitioners,

v.

R. KEITH HIGGINSON, Commissioner, Water and Power Resources Service, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March, 1981

QUESTIONS PRESENTED

1. If the Federal Government would otherwise be permitted to take certain actions to mitigate the damage it had inflicted upon a natural landmark, and to regulate public access thereto, so as to accommodate long-standing activities having special significance to a group indigenous to the area, may such actions by the Government be deemed automatically barred by the First Amendment's Establishment Clause for the sole reason that the landmark's significance to the group, and the group's activities at the site, are religious in character?

2. Where the Federal Government expropriated a site having great religious importance to Navajo Indians, and thereafter managed the site in such a way as to prevent the exercise of traditional Navajo religious practices there, may the Indians' claims that the Government is required by

the Free Exercise Clause to take corrective measures to enable such religious practices to resume be summarily dismissed on the ground that governmental accommodation of the Indians' religious needs, in any manner that restricts encroachment by tourists, would violate the First Amendment rights of the latter?

3. May such a rejection by the Executive Branch of Free Exercise claims advanced by Navajo Indians be upheld notwithstanding Congress' clear expression of statutory intent that federal policies and regulations should, wherever possible, respect sites sacred to American Indians and accommodate the religious rites and ceremonies conducted there?

PARTIES TO THE PROCEEDING

Petitioners herein (appellants below), are Lamarr Badoni, Teddy Holiday, Betty Holiday, Jessie Yazzie Black, Jimmy Goodman

and Begay Bitsinnie, all individual Navajo Indians, and the Navajo Mountain Chapter, the Inscription House Chapter, and the Shonto Chapter of the Navajo Nation. ("Chapters" are communities of the Navajo Reservation, resembling in many respects the town meetings of New England.)

Respondents include the original defendants or their successors, R. Keith Higginson, Commissioner of the Water and Power Resources Services (formerly the Bureau of Reclamation), Russell Dickinson, Director of the National Park Service, and James Watt, Secretary of the Interior, all of whom were sued in their official capacities only; and the intervenors, the State of Utah, Central Utah Water Conservancy District, Colorado River Water Conservancy District, Southwestern Water Conservation District, and the State of Colorado.

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit herein, for the reasons stated below.

OPINIONS BELOW

The opinion of the United States District Court for the District of Utah, dated Dec. 30, 1977, granting summary judgment to defendants and intervenor-defendants (respondents herein) is set forth at App. A-1 of the Appendix to this petition, and is reported at 455 F.Supp. 641 (D. Utah 1977). The opinion of the United States Court of Appeals for the Tenth Circuit, dated November 3, 1980, affirming the judgment below, is set forth at App. A-36 of the Appendix to this petition, and is unreported as yet. The order of the Court of Appeals denying petitioners'

Petition for Rehearing and Suggestion for Rehearing En Banc is set forth at App. A-67.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1980. A timely petition for rehearing was denied on December 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or probhiting the free exercise thereof; ..."

American Indian Religious Freedom Act, Pub.L. 95-341, 92 Stat. 469 (1978)(codified in part at 42 U.S.C. §1996):

"Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution;

"Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

"Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

"Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

"Whereas the lack of a clear, comprehensive and consistent Federal policy has often resulted in the abridgement of religious freedom for traditional American Indians;

"Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

"Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of

their effect on traditional American Indian religions;

"Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

"Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

"Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances, banned: Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the tradi-

tional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

"Sec. 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action."

16 U.S.C. §1:

"There is created in the Department of the Interior a service to be called the National Park Service ... [to] promote and regulate the use of the ... national parks, monuments, and reservations ... to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

STATEMENT OF THE CASE

A. Introduction

As this Court said in Roemer v. Board of Public Works, 426 U.S. 736 747 (1976), a church can surely "be protected by the police and fire departments, [and] have its public sidewalk kept in repair." Public authorities routinely protect religious

shrines from desecration without any suggestion that they thereby run afoul of the Establishment Clause. A cathedral no less than a chemical plant or a cultural monument may be protected at public expense from destruction and invasion. So, too, a natural formation that one group worships as holy, no less than a wilderness area that another admires as a scientific wonder, may be protected at public expense from damage and intrusion.

Even if the validity of such action were otherwise in doubt, it should be beyond dispute where it was previous action by the Federal Government itself that threatened a religion's hallowed ground with destruction and the religion's rituals with extinction. At least in such a case, government measures that would have been impermissible where the significance of the sites and the character of the observance were wholly secular surely do not become

forbidden establishments of religion solely becuase the site in question is not merely revered but worshiped.

Yet this is precisely what the Government argued, and the Court of Appeals held, in the decision that Petitioners urge this Court to review on certiorari. Having all but destroyed a natural cathedral in the desert -- a majestic rock formation in southern Utah long regarded as a god by the Navajo -- the Government successfully evaded any ruling on Petitioners' Free Exercise allegations by interposing the Establishment Clause as a complete defense to the Navajos' pleas -- ultimately embodied in a federal civil action -- that at least marginal steps be taken to prevent this government-initiated abrigement of religious exercise from becoming absolute. If undertaken in the name of ecology, aesthetics, or economic gain, the very measures at issue here, including more

stringent restrictions on the tourists that the Government has brought to the site, would be entirely lawful. But the court below reasoned that, simply because the motives of the Navajo are undeniably religious, the Government is not only relieved of any obligation to minimize the harm that it has caused, but is indeed prevented from doing so -- and prevented, of all things, by the Religion Clauses of the First Amendment.

It is difficult to imagine a more striking inversion of the enduring principles for which the Religion Clauses have always stood. No doubt some governmental actions that gratuitously facilitate or advance a religious enterprise violate the Establishment Clause. But it turns the First Amendment completely on its head to hold, as the Court of Appeals did here, that the Establishment Clause prevents the Government from tailoring its activities

in otherwise unobjectionable ways -- and in ways it might well have employed in this very case if religion had not been involved -- so as to minimize the Government's own positive inroads upon practices protected by the Free Exercise Clause. Not even the advocates of total neutrality under the Religion Clauses -- those who view ours as a religion-blind Constitution rather than a Constitution that tolerates some special accommodations to religion and mandates others -- could endorse the principle implicit in the holding below, which actually places religion in a disfavored position.

B. Factual Setting[1]

For more than a century, bands of

1/ The facts regarding the religious practices and beliefs of the Petitioners and the claimed infringement of such practices and beliefs by federal action are undisputed, and are derived from the complaint, Petitioners' responses to interrogatories, and the affidavit and manuscript of Petitioners' expert.

Navajo Indians have lived in a rugged and remote region of labyrinthine sandstone canyons on the slope of Navajo Mountain, in the northwestern corner of the vast Navajo Indian Reservation. In the remarkable rock formations and intimate springs and seeps of this fantastic landscape reside the many gods whom the Navajo call upon in complex religious ceremonies, to render the protection and assistance that these gods alone are capable of bestowing. Among the many specific sites these Navajo recognize as especially holy, two are preeminent: "Head of Earth" (as the Navajo call Navajo Mountain itself), and the soaring sandstone arch now known as Rainbow Bridge.

A singular accomplishment of nature, Rainbow Bridge stands 309 feet high and reaches 258 feet across a deep, winding canyon of astounding beauty. To the Navajo, the arch is itself a god, invoked with

reverence in numerous ceremonies as a source of protection and bringer of rain. One such ceremony that is central to the rain-bringing rituals of this region can be performed only at the arch. And medicinemen have often made the arduous trip through the tortuous canyons of the region solely to collect the sacred waters from particular springs near the arch, to be used for other ceremonial purposes elsewhere.

In 1910, following the "discovery" of Rainbow Bridge by a group of white explorers, President William Howard Taft proclaimed a 160-acre tract including the arch to be Rainbow Bridge National Monument. Nevertheless, for the next half-century very few whites saw the arch, so isolated was Bridge Canyon from the non-Indian world. And the profound Navajo religious beliefs concerning the arch remained virtually unknown beyond the Navajo

Mountain area.[2] But the completion, in 1963, of Glen Canyon Dam on the Colorado River, under the provisions of the Colorado River Storage Project Act of 1956, 43 U.S.C. §620, and the consequent creation of Lake Powell behind the dam, backing water up under Rainbow Bridge itself, made possible tourist visitation to Rainbow Bridge on a large scale.[3] The National Park Service, which operates Rainbow Bridge

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2/ In the District Court, Petitioners herein submitted the affidavit of Dr. Karl Luckert, an expert in Navajo religion and ceremonialism, together with a manuscript authored by him, entitled Navajo Mountain and Rainbow Bridge Religion, a study that was subsequently published by the prestigious Museum of Northern Arizona. Because of its unique value and direct bearing on the issues raised by this case, 10 copies of the published volume (whose text is identical to the manuscript submitted to the District Court) have been lodged with the Clerk of the Court as Exhibit A to this Petition.

3/ Interrogatory responses by the Park Service revealed that from 1909 through 1962, a total of 23,890 tourists visited Rainbow Bridge. In 1975 alone, visitation exceeded 65,000.

National Monument and the Glen Canyon National Recreation Area (which includes Lake Powell and adjacent land), has taken various steps deliberately to promote such tourism, including installing a floating dock at the Bridge; licensing tour boats, which bring large numbers of tourists to the Bridge each day; permitting the stationing of a large floating marina just downstream from the Bridge;[4] and generally touting the Bridge as a major attraction of Lake Powell, itself a primary recreation spot for the entire Southwest.

All of these actions have had cumulatively severe impact on the religious practices and beliefs of traditional Navajos, including the Petitioners and the

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4/ The Court of Appeals noted the assertion in the Government's brief that the marina had been moved. App. A-40, n.2. In fact, although the Government has said that it intends to move the marina, the marina was still in place as recently as March 5, 1981.

persons they represent. The construction of the dam and the consequent flooding of Bridge Canyon have caused the destruction of sites of major religious significance and the drowning of the gods who resided there. And those actions, with the others listed above, have caused an enormous influx of non-Indian tourists into the area, resulting in direct interference with Navajo religious ceremonies as well as desecration of other sites of importance. Interrogatory responses filed by Petitioners in the District Court showed several specific instances in which Navajo ceremonies were halted or had to be started over because of the intrusion of tourists, and other occasions on which the presence of large crowds of tourists at the Bridge discouraged the medicinemen from even attempting to perform their rituals.

As Dr. Karl Luckert, Petitioners' expert, noted in his affidavit, traditional

Navajo religion depends upon the esoteric knowledge of priestly singers, or medicine-men, who call upon the powers of divine beings in the natural world through elaborate, semi-private rituals. For the Navajo priestly singers, the federal actions complained of here have struck at the heart of Navajo religious beliefs, have severely impaired the utility of important ceremonies, have prevented others from being held, and have hastened the time when this living body of traditional belief will be but a distant memory.

It was to seek recognition of their right to the continued exercise of their age-old religious practices and beliefs, and to lessen the profound disintegration of those practices and beliefs caused by the flooding of Bridge Canyon by Lake Powell and by the desecration of the remaining sacred areas and rituals by Government-encouraged tourism, that the Petition-

ers initiated this action.

C. Course of the Litigation

Petitioners (six individual Navajo Indians, three of whom are "medicinemen," religious leaders and healers,[5] and three "chapters," or communities of Navajo people, each of which consists of several hundred adult Navajo Indians) filed this action in 1974, in the United States District Court for the District of Utah. Petitioners alleged that the various federal actions discussed above with respect to Rainbow Bridge National Monument, Glen Canyon National Recreation Area, and Glen Canyon Dam, had severely and directly impaired their religious practices and beliefs pertaining to Rainbow Bridge and its vicinity, contrary to the Free Exer-

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5/ Two other medicinemen originally named as plaintiffs, Nakai Dit1'oi and Joe Manygoats, died during the course of the litigation.

cise Clause of the First Amendment. Petitioners accordingly sought appropriate declaratory and injunctive relief to minimize the infringement complained of.[6] Jurisdiction was based upon 28 U.S.C. §§1331, 1332, and 1361, and 5 U.S.C. §§701-706.

Petitioners did not specify in their complaint the precise relief they sought, asking only for such relief as the District Court deemed appropriate in light of the rights infringed and the alternatives available. Petitioners believed, and asserted below, that a spectrum of remedies was conceivable -- from lowering the level of Lake Powell to numerous far less severe steps to control and limit tourist activity at the Monument. The District Court, however, never reached the point of

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6/ Two other claims originally alleged in Petitioner's complaint have since been abandoned or have become moot.

considering any specific relief. Instead, it simply granted Respondents' motions for summary judgment, holding first that, since Petitioners had no "property interest" in Rainbow Bridge, they could maintain no Free Exercise claims as to it; and second, that Petitioners' religious practices and beliefs could not possibly be weighty enough to overcome the Federal Government's interest in the operation of Glen Canyon Dam. Despite Petitioners' contentions to the contrary, the District Court treated the lowering of the Lake as the only relief material to Petitioners' claims. App. A-20-23.[7]

7/ From the outset of the litigation, Petitioners had urged the District Court to consider remedies besides lowering the Lake. The Court took note of some of the available options in a pre-trial order entered on October 26, 1976, reporting on efforts to arrive at a settlement of the litigation, and Petitioners' memorandum in opposition to Respondents' motions for summary judgment noted, at pp. 7-8, that while lowering the Lake would repair virtually the entire injury, "[o]ther, less

On Petitioners' appeal, the Court of Appeals properly rejected the District Court's ruling that lack of a property interest barred Petitioners' Free Exercise claims, see Sequoyah v. T.V.A., 620 F.2d 1159, 1164 (6th Cir. 1980), cert. denied, 49 U.S.L.W. 3332 (1980), App. A-43, but it agreed that the federal interest in maintaining the designed level of Lake Powell outweighed any religious interests Petitioners might assert. App. A-47. In response to Petitioners' further argument

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7/ (cont.) drastic measures are available." The point was reiterated and expanded at oral argument.

Respondents, however, consistently characterized the suit in the District Court as one seeking only a court-ordered decline in the Lake's level. Such characterization obviously made their arguments more palatable, since the burden on Petitioners to establish an entitlement to such relief would be enormous. And when, on appeal, Petitioners claimed error in the District Court's refusal to consider lesser measures, the Respondents somewhat disingenuously professed surprise at this "change" in the Petitioners' case. Brief of Federal Appellees at 11.

that the District Court erred in failing to consider lesser measures that would mitigate the infringements complained of, the Court of Appeals cursorily examined a few such measures suggested in Petitioners' brief, but made no effort to consider the range of possible measures -- despite Petitioners' suggestion that the case be remanded for just that purpose. For the Court of Appeals was of the view that protecting the sites and practices Petitioners deemed sacred by restricting in any degree "the public['s] ... normal use of [the] area," App. A-54, would automatically offend the First Amendment rights of tourists to visit the Monument, inasmuch as <u>any</u> policing of tourist activity to accommodate religion as such would make "the Monument ... a government-managed religious shrine," in violation of the Establishment Clause.

App. A-57.[8] Having thus determined that "no basis for relief" was shown in the record, the Court of Appeals affirmed the dismissal of the complaint without actually examining Petitioners' claim of infringement.

8/ In light of this unmistakable premise of the Court of Appeals' holding, and the procedural posture of this case -- in which Petitioners have been prevented from adducing proof of the insufficiency of various theoretically available protections mentioned by the Court of Appeals -- the breadth of the decision below is in no degree mitigated by the opinion's passing reference to Park Service regulations supposedly protecting the Monument from certain tourist-imposed damage or permitting the issuance of public assembly permits for after-hours religious ceremonies at Rainbow Bridge, App. A-56-57. These regulations, which were never addressed at the District Court level, are transparently inadequate on their face to offset in any significant degree the abridgment of which Petitioners complain; have been neither shown nor alleged to represent actual practices by Respondents at Rainbow Bridge; and leave completely untouched the facts, accepted by the Court of Appeals in reviewing the summary judgment entered against Petitioners, that "[t]ourists visiting the sacred area have desecrated it by noise, litter and defacement of the Bridge," and that "[b]ecause of ... the presence of tourists [Petitioners] no longer hold ceremonies in the area of the Bridge." App. A- .

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING MANDATES A DEGREE OF GOVERNMENT HOSTILITY TOWARD RELIGION THAT CONFLICTS WITH VIRTUALLY EVERY DECISION OF THIS COURT UNDER THE RELIGION CLAUSES.

Although the question of appropriate relief was never addressed in the District Court, that issue became the basis for the Court of Appeals' decision herein.[9] The Court of Appeals' analysis of that issue runs roughshod over the painstaking efforts by this Court to delineate the ways in which government may act without impermissibly burdening one person's religion or favoring another's.

The Court of Appeals was faced with a record that showed direct and substantial

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9/ Decisions of this Court have held it to be error to determine an appeal on grounds not considered by the court or parties below. Singleton v. Wulff, 428 U.S. 106, 120-121 (1976); Hormel v. Helvering, 312 U.S. 552, 556 (1941). The judgment below could properly be reversed and remanded on this basis alone.

impairment of traditional religious practices, brought about by a series of government actions.[10] Rarely in this century have courts faced such palpable Free Exercise violations. Petitioners had suggested that various measures involving limitations on tourist activity at the Monument -- all of which measures fell far short of lowering the level of Lake Powell -- could and should be considered.[11] Among the measures mentioned in a pre-trial order in the District Court and in Petitioners' brief in

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10/ The decision below appears to place some weight on the fact that tourists, not the government, were immediately responsible for the interference with ceremonies and defacement of sites. App. A-52. But the record is clear that it was government action which facilitated and encouraged the heavy tourist use of the Monument. Cf. NAACP v. Alabama, 357 U.S. 449, 463 (1958).

11/ Actually lowering the level of Lake Powell, while entirely effective to remedy Petitioners' complaints, was a form of relief that both the District Court and the Court of Appeals firmly rejected. App. A-23, A-48. Cf. Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974).

the Court of Appeals were occasionally closing the Monument to allow ceremonies to be held, prohibiting the use of alcohol and other sacrilegious activity, moving the floating marina,[12] and more strictly limiting tourist visitation. None of these actions, or others that may readily be imagined,[13] is even arguably beyond the lawful power of the Respondents.[14] Yet

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12/ See, n.4, supra.

13/ Another step that might have been considered and that would surely be addressed at trial were the judgment below to be reversed with directions to remand to the District Court, is removal of the floating dock at the Monument. Such a "passive" control measure would allow tourists to view the arch from their boats but would prevent most from landing, thereby ending the great bulk of tourist-related interference experienced by Navajo medicinemen.

14/ Indeed, the record shows that, when a rockfall occurred recently near the Bridge, the Monument was closed to all tourists within an hour and remained closed for two days. Depo. of Temple Reynolds, pp. 40-41. The Park Service has been considering plans to move the marina for its own reasons. Id., at 31-33; Order entered Oct. 26, 1976, at para. 2. And as the

solely because these steps, if taken for the purpose of alleviating the infringement of Petitioners' Free Exercise Rights, would necessarily aid Petitioners in the practice of their religion, the Court of Appeals regarded all such relief as foreclosed.

Such excessive zeal in guarding against governmental sectarianism has often been rejected by this Court, beginning in Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815) (ban on taking of private property for non-public use applies with full force when property taken belongs to church and persons benefitted are the poor or the parish), even in situations where there was no apparent Free Exercise abrigement that mandated corrective governmental

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14/(cont.) Court of appeals noted, the Park Service has broad power to regulate tourist activity so as to leave parks and monuments unimpaired for future generations. 16 U.S.C. §1, App. A-53.

action. See, e.g., Everson v. Board of Education, 330 U.S. 1 (1947) (state may reimburse church-school students for transportation expenses); Board of Education v. Allen, 392 U.S. 236 (1968) (state may supply textbooks to church-school students); Zorach v. Clauson, 343 U.S. 306 (1952) (state may accommodate public school curriculum to religious needs by releasing students for religious education during school hours); Tilton v. Richardson, 403 U.S. 672 (1971) (government may grant funds to religious colleges for capital improvements); Roemer v. Board of Public Works, 426 U.S. 736 (1976) (state may provide financial assistance to religious colleges). And where Free Exercise concerns have been even indirectly implicated, this Court has not hesitated to approve, and sometimes even to require, extraordinary treatment of religious groups to avoid unduly burdening their beliefs or unduly inhibiting their religious

practices. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish children must be exempted from secondary education to avoid secular influences imcompatible with their parents' faith); Walz v. Tax Commission, 397 U.S. 664 (1970) (state may exempt religious property from taxation where other charitable uses are similarly exempt); Sherbert v. Verner, 374 U.S. 398 (1963) (state must pay unemployment benefits to Jehovah's Witness who refused on religious grounds to accept jobs requiring Saturday work).

In the instant case, no otherwise unlawful or even extraordinary steps are sought, and the Free Exercise interest is undeniably of enormous magnitude. Under such circumstances, to hold that the Government may not be ordered to lessen the burden that the Government itself has imposed upon Petitioners' religion -- even when the very actions urged as means to

this end could be, often are, and might here have been, taken by the Government for wilderness protection or landmark preservation purposes if urged by other than religious groups acting out of non-religious motives -- twists the Religion Clauses beyond recognition.[15]

Among the implications of such a holding is an invitation to government oppression of religion, and a bar to any rectification of government-caused injuries to religious interests. For whenever government action has directly impaired religious practices, any corrective response will, by definition, aid the religion impaired. But if "hostility, not neutrality, would characterize ... denial of the temporary use of

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15/ Cf. Hunter v. Erickson, 393 U.S. 385, 391 (1969) (equal protection clause precludes interposing barriers to enactment of property regulations for fair housing purposes where no similar barriers inhibit enactment of property regulations for environmental or other purposes unrelated to race or religion). See also, n.19, infra.

an empty public building to a congregation whose place of worship has been destroyed by [natural] flood," Abington School District v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring), a most decided hostility would mark an insistence on importing tourists to overrun public lands whose availability for worship has been all but destroyed by a flood of Government's own making. Under the decision below, the more direct and substantial the Free Exercise violation, the more impotent is a court to grant relief. And if measures to aid religion are precluded when the Government has actually impaired religious practices, how may Government justify such comparatively gratuitous gestures as extending its fire, police, parking, traffic, or liquor regulations to churches and their environs? Cf. Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 627 (1961).

The Establishment Clause is frequently

raised as a defense to Free Exercise claims. See, e.g., Sherbert v. Verner, 374 U.S., supra, at 409-410. The decision below demonstrates, perhaps as well as any can, the dangerous consequences of allowing such a defense to swallow up the freedom that both Religion Clauses were ultimately meant to foster. Cf. McDaniel v. Paty, 453 U.S. 618 (1978) (goals of preventing church-state entanglement and religious establishment do not justify abridging religious freedom by excluding clergy from lawmaking process). Whatever limits upon extraordinary governmental accommodation of religion this Court might eventually impose in the service of anti-establishment and equal protection norms, this case presents the Court with an important opportunity to address the circumstances in which the Federal Government may and indeed must extend entirely ordinary protection to religious sects who have been oppressed by

the Government's own acts -- where failing to extend such protection would evidence not neutrality but hostility toward religion. The clarity with which this critical question is presented here makes the instant case unusually appropriate for review.

II. THE DECISION BELOW RAISES NOVEL AND IMPORTANT QUESTIONS OF THE INTERPLAY BETWEEN THE RELIGION CLAUSES AND THE MANAGEMENT OF PUBLIC LANDS.

This Court and several Courts of Appeals have held that the government may not prevent religious groups from conducting peaceful religious observances on public property, including public parks, and that merely accommodating such observances, without subsidizing them or giving them uniquely favored treatment, does not violate the Establishment Clause. See, e.g., Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951); O'Hair v. Andrus, 613 F.2d 931, 937 (D.C. Cir. 1979). In the cited cases, the desires of religious

groups to hold their services at the sites in question were motivated at least in part by the public nature of the places involved, but more traditional sanctuaries were no doubt available in each instance. Here, however, no alternative sanctuary could possibly serve as a substitute, and the designation of Rainbow Bridge as a public park -- indeed, a national monument -- is an obstacle, not an inducement, to the religious observances of the traditional Navajo medicinemen whose ancestors worshiped there without governmental interference. The arch itself has long been, and remains to this day, an object of worship. The rituals require privacy and solemnity for the efficacious communications with the spirit world that is their goal -- hardly an ambience compatible with the boisterous activity of tourists enjoying powerboat vacations with governmental blessing, encouragement and even direct

assistance. Thus Petitioners' Free Exercise claim reaches this Court with considerably greater urgency than in the typical "public park prayer" context.

The Court of Appeals nonetheless experienced difficulty with any notion that the Government might be required, or even permitted, to control the flow and conduct of tourists out of respect for Petitioners' religious beliefs;[16] its concern was that

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16/ The opinion below in fact shows extraordinary solicitude for tourists, deeming their "right" to visit Rainbow Bridge without restraint itself to be of constutional dimension. Relying on such cases as Hague v. C.I.O., 307 U.S. 496, 515 (1939); Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969); Cox v. Louisiana, 379 U.S. 536, 554, 555 (1965); and others, the Court of Appeals held that Petitioners' complaints that they have been prevented from engaging in their religious practices could not justify interference with the "right" of the public to visit Rainbow Bridge without restriction. App. A-54-56 But each of those cases held that the interest of the public at large in utiliing public places must yield to the exercise of legitimate and sincere First Amendment rights (including those under the Free Exercise Clause, as in Niemotko v. Maryland).

"the monument would [otherwise] become a government-managed religious shrine." App. A-57. But the whole point is that Rainbow Bridge is a religious shrine; it was that long before it was declared to be a national monument. And, although Rainbow Bridge is government-managed, it has lost none of its sacred character to the Navajo -- despite the oppressive effects of the actions that the Federal Government has taken there. One doubts that the Government would claim that it could declare the Mormon Temple to be a national monument and

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16/(cont.) The Court of Appeals' decision opens the door to the very kind of mob suppression of First Amendment rights that this Court condemned in Cox v. Louisiana, 379 U.S. at 551.

Old North Church in Boston is of great historical importance and interest to the nation, but surely tourists have no right to prevent the congregation from holding its Sunday services there, defended by local police from trespass and noise, simply because the Government has declared the building to be a national shrine. Yet, if the decision below stands, not even that obvious proposition is secure.

proceed to manage both it and the immediately adjacent public streets and parks so as to prevent the congregation from worshiping there. Cf. Terrett v. Taylor, supra. Yet the Navajo have suffered just such an injustice here, and the decision of the Court of Appeals gives the Government's sacrilege constitutional immunity.

While this case was pending in the Court of Appeals, Congress enacted the American Indian Religious Freedom Act, Pub. L. 95-341, 92 Stat. 469 (1978), reminding every federal agency that otherwise lawful land management actions might impinge impermissibly upon the Free Exercise rights of Native Americans who revere sites now considered to be public land. Enacted in the exercise of Congress' unique ficuciary relationship with the Indian people, see, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the Act mandates a policy of precisely such sensitivity to and accom-

modation of traditional Indian religions as Petitioners have urged in this case. The Court of Appeals' only reference to the Act was its terse observation that "we do not have before us [its] constitutionality." App. A-60. Although harsh, this suggestion -- that any accommodation to the traditional practices and needs of American Indians in consideration of their religious beliefs and rituals on the public lands would be of doubtful constitutionality -- is fully consistent with the rest of the opinion below, which casts a cloud of constitutional doubt over numerous other actions by Congress prompted by similar concerns. For example, Pub.L. 91-550, 84 Stat. 1437 (1970), returned to the Taos Indian Pueblo its sacred Blue Lake and surrounding lands for religious purposes; 25 U.S.C. §§640d-19 and 640d-20 (1974), guarantee Hopi Indians access to sacred sites located on the Navajo Indian Reservation; 16 U.S.C. §228i(c)

ensures the Havasupai Indians access to sacred sites located in Grand Canyon National Park; and 16 U.S.C. §668(a), which provides for the criminal prosecution of all persons who possess eagle feathers, exempts Indians who have such feathers for religious purposes. Moreover, various federal agencies, including Respondents herein, have promulgated regulations and policies with similar objectives; 21 CFR §1307.31 provides for the exemption from criminal prosecution of Indians who use peyote, a controlled substance, for religious purposes; and the Colorado River Management Plan prohibits public access at all times to specified Hopi Indian sacred sites located in Grand Canyon National Park. U.S. Department of Interior, Colorado River Management Plan, at Appendix A-5 (December, 1979).

Nor is such federal protection accorded only to Indian religious beliefs. Congress

has provided exemptions for individuals from paying Social Security taxes, 26 U.S.C. §1402(e) and (g) (1968), and from serving in the armed forces, 50 U.S.C. App. §456(j) (1967), see, Welsh v. United States, 398 U.S. 333 (1970); Id. at 369-371 (White, J., joined by Burger, C.J., and Stewart, J., dissenting), where doing otherwise would conflict with the dictates of an individual's religion. Congress has also provided for compensatory time off for religious observances so that government employees may practice their religions without interference. 5 U.S.C. §5550(a) (1979). And sectarian religious services are regularly held at privately owned churches now designated as national historical sites and operated by Respondent National Park Service.[17] Indeed, Respondent

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17/ Among these are such famous churches as the Christ (Old North) Church, Boston, Massachusetts; Gloria Dei (Old Swedes)

Park Service itself owns and operates churches at many national parks for the convenience of visitors.[18]

If the decision of the Court of Appeals remains undisturbed by this Court, these Acts of Congress, federal regulations, and federal policies, as well as many other similar laws, regulations, policies and practices at all levels of government -- all of which protect Americans of every religious persuasion in the practice of their respective faiths -- are in jeopardy of being overturned. This Court should announce its unwillingness to countenance any such result.

The principle of governmental neutrality in matters affecting religion cannot

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17/(cont.) Church and St. Joseph's Roman Catholic Church, both in Philadelphia, Pennsylvania.

18/ Examples include the Shrine of the Ages Chapel, Grand Canyon National Park; Yellowstone National Park Chapel; and Yosemite National Park Chapel.

mean that religion must always fend for itself, no matter how harshly the actions of Government may oppress religious life. The Religion Clauses enact neither the Law of the Jungle nor the Bureaucratic Imperative. Yet the Court of Appeals has consigned Petitioners, and all others whose religious practices necessarily involve lands over which the government asserts plenary authority, to a hopeless struggle with the federal land managers and bureaucrats, who under the decision below must act in total disregard of all religious concerns, and may do nothing -- voluntarily or under court order[19] -- even to repair

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19/ Although it may be that some permissible accommodations of religion are not constitutionally compelled, the Establishment Clause could not be said to bar an accommodation when ordered by a federal court if the same accommodation would be allowed when voluntarily chosen by Congress or the Executive Branch. For the First Amendment, which commands "Congress [to] make no law respecting an establishment of religion," certainly restricts the Judicial

the damage caused by such mandated indifference.

CONCLUSION

Petitioners have suffered direct and serious impairment of their religion at government hands. In the courts below, they sought some measure of accommodation of their beliefs, not different in kind from that typically accorded more orthodox

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19/(cont.) Branch no more than it does the Legislative or the Executive. And judicially mandated relief is, if anything, the most appropriate form of remedial action, not the least. Cf. Fullilove v. Klutznick, 100 S. Ct. 2758, 2799, n.4, 2800 (1980) (Stewart, J., dissenting); University of California Regents v. Bakke, 438 U.S. 265, 300-01 (1978) (Powell, J., announcing judgment); Id. at 364 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). Thus the Court of Appeals could not have suggested, and did not hold, that the Establishment Clause, which it invoked as a bar to court-ordered adoption of the remedies Petitioners sought below, might leave Congress or the Executive free to adopt such remedies in voluntary response to Petitioners' pleas. The present case therefore squarely presents the question whether even voluntary accommodation is ruled out by the Establishment Clause.

faiths, although seemingly unusual due to the distinct nature of Petitioners' religion. There are remedies available both modest and feasible that would substantially lessen the burdens on Petitioners' religion. Yet Petitioners have never received a factual hearing on their claim that the abridgement of their religious freedom is both needlessly severe and constitutionally avoidable. The decision of the court below, if allowed to stand, insures that the continued impairment of the beliefs and practices of Petitioners and others like them will never be remedied. For the holding of the Court of Appeals gravely jeopardizes the spirit of benevolent neutrality that until now has characterized this Nation's stance towards diverse religious creeds.

Particularly in light of this Court's recent determination to review the upper and lower limits of state accommodation to

religion in managing the facilities of public higher education, Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), cert. granted sub nom. Widmar v. Vincent, 49 U.S.L.W. 3617 (No. 80-689); in regulating public forums, Heffron v. ISKCON, Inc., 299 N.W.2d 79 (Minn. 1980), cert. granted, 49 U.S.L.W. 3515 (No. 80-795); and in allocating government unemployment benefits, Thomas v. Review Board, 391 N.W.2d 1127 (Ind. 1979), cert. granted, 444 U.S. 1070 (No. 79-952), it would seem sensible similarly to invite plenary briefing and argument on the merits of the ruling below -- a ruling which astonishingly mandates a disfavored position for religion and religious values in the Federal Government's management of natural and historic resources.[20]

20/ At the very least, Petitioners respectfully submit that this Petition should be held for disposition in light of Widmar, Heffron, and Thomas.

Respectfully submitted,

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Lamarr BADONI, Teddy Holiday, Betty Holiday, Jessie Yazzie Black, Jimmy Goodman, Begay Bitsinnie, Shonto Chapter of the Navajo Nation, Navajo Mountain Chapter of the Navajo Nation, and Inscription House Chapter of the Navajo Nation, Plaintiffs,

v.

R. Keith HIGGINSON, Commissioner, Bureau of Reclamation; Ronald H. Walker, Director, National Park Service; Cecil V. Andrus, Secretary of the Interior, Defendants,

and

State of Utah, Central Utah Water Conservancy District, Colorado River Water Conservation District, Southwestern Water Conservation District, and State of Colorado, Defendants in Intervention.

No. C-74-275

United States District Court,
D. Utah, C.D.

Dec. 30, 1977

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ALDON J. ANDERSON, Chief Judge

The instant action was commenced on September 3, 1974, by eight individual Navajo Indians and by three Navajo "Chapters." The Navajo "Chapters" are local organizations of the Navajo Nation, each consisting of all the adult members of its respective communities. One of the original eight individual plaintiffs has died, and one has been dismissed from the action. Three of the individual plaintiffs are qualified and recognized among their people as medicine men-i.e., religious leaders of considerable stature among the Navajo, learned in Navajo history, mythology and culture, and practitioners of traditional rites and ceremonies of ancient origin. The remaining three individuals are enrolled members

of the Navajo Tribe of Indians and reside in the general area of Rainbow Bridge National Monument in Southern Utah.

The original party defendants are various officials within the United States Department of the Interior. On February 26, 1975, this court granted the motions of the Colorado River Water Conservation District, the Southwestern Water District, the State of Colorado, the State of Utah, and the Central Utah Water Conservancy District to intervene as defendants.

In their amended complaint, plaintiffs state that under certain operating criteria promulgated by defendant Andrus or his predecessor, the waters of Lake Powell are encroaching upon the Rainbow Bridge National Monument, and that defendants Higginson and Walker have licensed several persons and corporations to operate tour boats on Lake Powell, several

of which make daily trips to Rainbow Bridge, and have in other ways facilitated the development of tourism in the Monument area. Against this background, plaintiffs assert three claims for relief: First, that the flooding of the Rainbow Bridge National Monument has resulted in the destruction and desecration of many Navajo gods and sacred areas in the vicinity and has thereby violated plaintiffs' right to the free and uninhibited exercise of their religious beliefs and practices, as guaranteed by the First Amendment; second, that defendants have violated and are violating section 1 of the Colorado River Storage Project Act which provides that defendants "...shall take adequate protective measures to preclude impairment of Rainbow Bridge National Monument", and third, that defendants' operation of the Glen Canyon Dam and Reservoir is a continuing major

federal action that significantly affects the quality of the human environment, within the meaning of the National Environmental Policy Act (NEPA) and that defendants have not filed the required environmental impact statement concerning their actions. To remedy the situation, plaintiffs ask that this court issue a permanent injunction against defendants, ordering them to take actions to preclude the impairment of the Rainbow Bridge National Monument and the surrounding Glen Canyon National Recreation Area and plaintiffs' interest therein, and to cease further major actions with respect to the operation of the dam and reservoir until the required environmental impact statement is completed.

On various grounds that are discussed below, the following defendants filed properly supported motions for summary

judgment: On February 25, 1977, defendant-intervenors State of Utah and Central Utah Water Conservancy District; and on February 28, 1977, the original federal defendants and defendant-intervenors Colorado River Water Conservation District and Southwestern Water Conservation District. On February 28, 1977, defendant-intervenor State of Colorado filed alternative motions under Rule 12(c) and Rule 12(d), Federal Rules of Civil Procedure. Because matters outside the pleadings have been presented to and not excluded by the court, the court will treat the State of Colorado's Rule 12(c) motion for judgment on the pleadings as one for summary judgment. On May 23, 1977, plaintiffs filed a memorandum in opposition to the various motions of defendants and intervenors. The matter was argued before the court at length on September 19, 1977. Having

fully and carefully considered the matters presented by way of written memorandum and oral argument in the light most favorable to plaintiffs, the court deems itself fully advised, and concludes that federal jurisdiction is properly invoked under 28 U.S.C. § 1331 and that the respective motions for summary judgment must be granted. The three claims of plaintiffs and the reasons for their failure are discussed in the order in which they were presented to the court.

1. Free Exercise of Religion

The factual backdrop of plaintiffs' First Amendment claim is developed in plaintiffs' amended complaint and memorandum in opposition to the motions for summary judgment. Essentially, it is claimed that certain geological formations in the Rainbow Bridge area have held positions of central importance in the religion of the Navajo people of the Navajo Mountain area

for at least 100 years. These shrines, which are regarded as the actual incarnate forms of Navajo gods, have performed protective and rain-giving functions for generations of Navajo singers. Ceremonies have been performed in Bridge Canyon near Rainbow Bridge, and water from the springs there has been used for other ceremonies. Plaintiffs allege that the flooding of Bridge Canyon in the vicinity of Rainbow Bridge and the greatly increased tourist traffic due to defendants' actions have resulted in the following specific infringements upon plaintiffs' First Amendment rights: the destruction of holy sites; the drowning of entities recognized as gods by the plaintiffs; prevention of plaintiffs from performing religious ceremonies; desecration of holy sites, especially abodes of gods of the plaintiffs, by tourists; and, by virtue of all of this, injury to the efficacy of plaintiffs' religious prayers,

and entreaties to their remaining gods. Plaintiffs stress that the result of this sacrilege has been, and will continue to be, severe emotional and spiritual distress for plaintiffs and Navajo people generally, all of which is violative of plaintiffs' rights to the free exercise of their religious beliefs and practices. Plaintiffs request this court to order defendants to take appropriate steps to operate Glen Canyon Dam and Reservoir in such a manner that the important religious and cultural interests of plaintiffs will not be harmed or degraded, and to issue rules and regulations to prevent further destruction and desecration of the Rainbow Bridge area by tourists.

[1] The First Amendment claims of plaintiffs constitute a unique challenge to the projects and actions of defendants and present to this court some rather novel questions of law. Nevertheless, it is the

opinion of the court that plaintiffs' free exercise of religion claims must fail on two alternative grounds.

First, as defendants have pointed out, plaintiffs do not allege nor do they have any property interest in the Rainbow Bridge National Monument. It is undisputed that even though the various uses of the area have fluctuated over the years and the monument area is within the present boundaries of the Navajo Indian Reservation, the 160-acre monument has never actually been a part of the Navajo Reservation. The monument was created by Presidential Proclamation on May 30, 1910, by President William H. Taft in accordance with authority conferred upon him by the Act of June 8, 1906, 16 U.S.C. § 431. Since that time, none of the flucuations of uses of the land purported to affect the monument, and the site has been held in federal ownership as a National Monument. It is part of the National Park System adminis-

tered by the National Park Service. Any aboriginal proprietary interest that the Navajos may have held in this land would have been extinguished by the entry of the white man in earlier years. See Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 339, 65 S.Ct. 690, 89 L.Ed. 985 (1945). Because plaintiffs have no property interest in the land that is the subject of this action, defendants argue that plaintiffs' First Amendment claim "... does not come within a country mile of any cognizable legal theory upon which relief can be granted." The court feels that the lack of a property interest is determinative of the First Amendment question and agrees with defendants that plaintiffs have no cognizable claim under the circumstances presented.

Despite the numerous cases presented to the court, all of which stand for valid general First Amendment principles, the

parties concede that there are no cases directly in point and that the case most analogous to the present one is Pillar of Fire v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250 (1973). There, the Denver Urban Renewal Authority filed a petition to condemn the first permanent church building of the Pillar of Fire Church which was claimed to have great historical and religious significance. The Colorado Supreme Court thoroughly considered the First Amendment issues, directed the application of the balancing of interests test, and remanded the case for an evidentiary hearing. [On remand it was held that the city could condemn and acquire the church. Denver Urban Renewal Authority v. Pillar of Fire, 552 P.2d 23 (Colo. 1976).] The salient point for the present purposes, however, is that even in this most relevant case the property in dispute was owned by the individuals and organization which sought its pro-

tection rather than by a third person. Thus, the case is inapposite here.

To hold that a person may assert First Amendment rights to the disruption of the property rights of others, even if the other person is a government, could and likely would lead to unauthorized and very troublesome results. An example suggested by defendants Utah and the Central Utah Water Conservancy District is exaggerated but instructive and illustrative of the problem presented by plaintiffs' claims: A person might sincerely believe that he or a predecessor encountered a profound religious experience in the environs of what is now the Lincoln Memorial in Washington, D.C., and that experience might cause him to believe that the Lincoln Memorial is therefore a sacred religious shrine to him. That person, however, could hardly expect to call upon the courts to enjoin all other visitors from entering the Lincoln Memorial in order

to protect his constitutional right to religious freedom. The weakness in plaintiffs' claim is apparent. Thus, even assuming that all of the assertions as to the actuality and sincerity of plaintiffs' beliefs are true,*/ the court finds that the assertions do not give rise to a cognizable First Amendment claim under the circumstances of the instant case.

[2] Second, even if plaintiffs' claims were cognizable First Amendment claims, the

*/ On July 18, 1977, plaintiffs filed an affidavit and lengthy monograph of Dr. Karl W. Luckert, a purported expert in the field of Navajo culture and belief, concerning the history and nature of plaintiffs' religious beliefs. On September 2, 1977, defendant United States filed a motion to strike the affidavit and monograph on the grounds that the documents fail to comply with Rule 56(d), Federal Rules of Civil Procedure, in that the documents would not be admissible in evidence. Plaintiffs filed a response to this motion on September 19, 1977. For the purposes of this order only and without ruling on the merits of the motion to strike, the court accepts as established and true all of the facts and conclusions in the affidavit and monograph of Dr. Luckert. And in light of the granting of the motions for summary judgment of defendants, the motion to strike is rendered moot.

court concludes that under the United States Supreme Court's balancing of interests test the interests of defendants would clearly outweight the interests of plaintiffs. Both plaintiffs and defendants agree that the balancing of interests test is applicable in the instant action and rely upon the case of Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In Yoder, members of the Amish faith successfully claimed that the state's compulsory education laws violated their right to the free exercise of their religion. The Supreme Court made it clear that its balancing analysis requires the following once a burden on the free exercise of religion is demonstrated:

> ... it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

406 U.S. at 214, 92 S.Ct. at 1532. Thus,

a balancing analysis requires inquiry into the following three areas: first, the existence of a bona fide and sincere religious claim; second, the nature of the claimed religious interests; and third, the nature of the state interests.

In Yoder the Supreme Court held that the Amish claim qualified for protection under the Constitution because,

> ... the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. [Emphasis added]

406 U.S. at 216, 92 S.Ct. at 1533. The present plaintiffs have gone to great lengths to construct a cognizable action out of their claim of First Amendment religious infringement. Again, however, even assuming that all of the assertions as to the existence of plaintiffs' beliefs are true, it is apparent that these interests

do not constitute "deep religious conviction[s], shared by an organized group and intimately related to daily living."

Far short of this, pleading and discovery documents filed in this case indicate, among other things, that the medicine men who allegedly conduct the religious rites involving Rainbow Bridge and the surrounding areas are not recognized by the Navajo Nation as such. Also, the training of these medicine men has not been tribally organized or carried out, and took place years ago. The individually-named plaintiffs have attended a combined total of nine religious ceremonies within the boundaries of Rainbow Bridge Monument since 1965 (question 5(c), at p.7) and the same plaintiffs had attended religious ceremonies within the boundaries of Rainbow Bridge Monument only infrequently prior to 1965 (question 5(d), at p.8). None of the individually-named plaintiffs answering the

interrogatories could identify times at which other ceremonies were held or how many individuals attended (question 5(i)(1), at p.9). The eight individually-named plaintiffs had visited the monument a combined total of eleven times since 1965, and such visits were infrequent. Taking the information supplied by the plaintiffs as true, there is nothing to indicate that at the present time the Rainbow Bridge National Monument and its environs has anything approaching deep, religious significance to any organized group, or has in recent decades been intimately related to the daily living of any group or individual. Rather, the record supplied by the plaintiffs is to the contrary.

As to the nature of plaintiffs' religious interest, two factors considered by the Court in Yoder with respect to the nature of the religious interest were the relationship of the religious practice in

question to the Amish way of life and the history of consistency of the practice as an indication of the sincerity of the practitioners. The Navajo plaintiffs claim that their religious interest involves the use of Rainbow Bridge and its surrounding areas for religious ceremonies. Plaintiffs claim that the earlier cited infringements of their First Amendment rights result from defendants' permitting Lake Powell reservoir to fill to a level at which reservoir waters enter into Rainbow Bridge National Monument, flood Bridge Canyon, and allow tourist access to the monument. Plaintiffs fail, however, to demonstrate in any manner a vital relationship of the practices in question with the Navajo way of life or a "history of consistency" which would support their allegation of religious use of Rainbow Bridge in recent times.

In an attempt to explain the absence of religious ceremonies at Rainbow Bridge in

recent times, plaintiffs state in their memorandum that the "Navajo ceremonies ... are not periodic ceremonies ... [but] are performed when needed, and requested by an individual or family." This statement of counsel fails to carry the burden imposed by Yoder of demonstrating a religious interest sufficient to carry the day here. Plaintiffs' answers to interrogatories indicate that few, if any, ceremonies have been conducted since 1965, even though the waters of Lake Powell did not enter the monument until 1971. In sum, the alleged interests of plaintiffs have not been established.

The nature of the defendants' interest, on the other hand, lies in the continued operation of Glen Canyon Dam and the Lake Powell Reservoir consistent with current statutory and regulatory authority. This interest is fully described in the opinion of the Court of Appeals for the Tenth Cir-

cuit in Friends of the Earth v. Armstrong, 485 F.2d 1, 4-6 (10th Cir. 1973). Basically, the interest concerns water storage, power generation, state's rights, international treaty rights, the public's proprietary rights and the benefits in water distribution and use which were to be returned to the Indians, and the government's public trust responsibility. With regard to water and power development, the Court of Appeals stated as follows at 485 F.2d 6:

> From the above description of the legislation, it is apparent that Lake Powell is an important element or link in the Colorado River water and power development. It cannot be considered alone as all the existing projects in the Upper Basin, and the planned ones, are interrelated and interdependent. The projects have different purposes and functions, but are dependent on Lake Powell to provide basic storage necessary to fulfill the delivery requirements to the downstream states and Mexico, especially in dry years. If these requirements can be so met by use of this storage, the upper states can develop the water allocated to them for irrigation and other projects. If this storage is

> reduced by a limitation on the level of Lake Powell, some projects built, and some authorized, are at least impaired. This interrelation created by the comprehensive plan for development is rather delicate and can be disturbed if the capacity of by far the largest storage or regulating unit is reduced significantly. The total development plan was given extensive consideration by water experts and by Congress. See 84th Cong. 1st Sess. (1955), S.Report 128, and 84th Cong. 2nd Sess. (1956), House Report 1087. The repayment schedules and power revenues were also fully integrated into the plan. See 2 U.S. Code Cong. & Admin. News, 84th Cong. 2d Sess. (1956), pp. 2352-59.

Furthermore, the Court of Appeals stated the following with respect to the specific question of power generation, at 11:

> In conclusion on the argument that Glen Canyon Dam should be operated at less than capacity, we again refer to the portion of this opinion which considers the elimination by Congress of provision for protective works for Rainbow Bridge, and to the termination by Congress, as to Rainbow Bridge, of the application of the general wording in section 3 of the Storage Act. This left the project as planned at the time Congress approved it, and this was to the full extent of its design capacity as now constructed in all

> respects. The officials of the Bureau of Reclamation who are charged with the operation of Glen Canyon Dam and Lake Mead have so operated the Dams, and this is correct. There was included a specific admonition by Congress to them that the power generation facilities be operated at their most productive rate (43 U.S.C. § 620f).

It is clear that the state interests in the operation of the dam and reservoir in the manner prescribed by statute and regulation are weighty and not overcome by the relatively weak showing made by plaintiffs.

2. Section 1 of the Colorado River Storage Project Act

Section 1 of the Colorado River Storage Project Act, 43 U.S.C. § 620, ends with the proviso: "That, as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate measures to preclude impairment of the Rainbow Bridge National Monument." In Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120

(1974), the United States Court of Appeals for the Tenth Circuit held, after extensive litigation, that action taken by Congress after the passage of the Storage Act demonstrated that the portion of section 1 that refers to Rainbow Bridge had been repealed. Nevertheless, plaintiffs, with an apparent erroneous concept of what is required of them as advocates, strongly contend that section 1 has not, in fact, been repealed. Plaintiffs quote language from Friends of the Earth stating that the case was "not really a situation of repeal by implication... but more a reversal of a previous position." 485 F.2d at 9.

[3] In so arguing, however, plaintiffs quote the language completely out of context and ignore the clear holding of the case. In Friends of the Earth, the court reviewed at length the various statutes and circumstances that demonstrated that

section 1 had been repealed by subsequent enactments. To put the language quoted by plaintiffs back in context, the court concluded as follows:

> This is thus not really a situation of repeal by implication... but more a reversal of a previous position after considering it fully in the public hearings and after the members apparently came to the conclusion that the protective works would be more detrimental than the presence of water in the Monument. ...This "repeal," if it should be called that, thus was straightforward, direct, and after hearings on the subject.

485 F.2d at 9 (emphasis added). In view of this precise holding, it is difficult to see how plaintiffs can seriously assert that section 1 can be resurrected and construed in any manner to aid them in this action.

3. Applicability of NEPA

Plaintiffs' third and final claim is that the operating criteria for Glen Canyon Dam and Lake Powell must be subjected to

an environmental impact study and statement under the mandate of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C). It is plaintiffs' position that the finalization of the operating criteria, which finally determine how water in the water project is to be distributed among the upper basin reservoirs, and when and how that water is to be released to the lower basin, was a major federal action having a significant effect upon the quality of the human environment. Since the defendants have not issued an environmental impact of such actions, this court is asked to halt such further major actions with respect to the operation of the dam and reservoir pending the completion of an EIS.

In Grand Canyon Dorries, Inc. v. Walker, 500 F.2d 588 (10th Cir. 1974), plaintiffs sought injunctive relief against

the Secretary of the Interior and various other officials on grounds very similar to those urged by the present plaintiffs. Specifically, the Grand Canyon Dorries plaintiffs alleged that the continuing operation of the Glen Canyon Dam is a major federal action requiring an EIS pursuant to 42 U.S.C. § 4321 et seq. The Tenth Circuit held, however, that this issue was not properly before the court since the Department of Interior had not at that time taken action sufficient to establish the Department's position regarding whether and how NEPA should be applied to the operation of the dam. The court concluded that only when the Department "... has exercised the broad discretion conferred by the Act and the Guidelines will the issues be ripe for judicial determination." 500 F.2d at 590.

[4] In an attempt to distinguish the instant action from the Grand Canyon Dorries case, plaintiffs claim that the

record in this case shows that the issues presented in Grand Canyon Dorries are now ripe for decision because plaintiffs have requested that the Department prepare an EIS and because some work has been done by defendants toward deciding whether a formal EIS should be prepared. The court finds, however, that plaintiffs' reliance upon the dicta in the Tenth Circuit decision to the effect that parties should request that the Department consider the preparation of an EIS, and upon any efforts thus far undertaken by the Department, is misplaced. The clear import of Grand Canyon Dorries, which obviously is binding upon this court, is that the Department must assemble the relevant information and take a position of sufficient clarity and finality that it can fairly be said that judicial review of that position would be justified and meaningful. There is nothing

in the record that indicates that the Department has at this time taken a position at all, let alone one that would meet this standard. To the contrary, it appears from the memoranda and affidavits on file herein that the Department is still actively considering and formulating its position regarding the applicability of NEPA and the necessity of an EIS in the Glen Canyon situation. Thus, this court concludes, as did the Tenth Circuit in Grand Canyon Dorries, that the question of the applicability of NEPA to the ongoing operation of the Glen Canyon Dam and Reservoir is not properly before the court.

[5] The court would like to add, however, that even if the NEPA question were properly presented at this time, the court is of the opinion that an EIS would not be required in the present case for two reasons. First, it appears that the

operation of the dam and reservoir are so strictly limited by congressional and contractual constraints that defendants' actions are merely ministerial actions which do not rise to the level of major federal actions. See Sierra Club v. Morton, 400 F.Supp. 610 (N.D.Cal. 1975); Morris v. Tennessee Valley Authority, 345 F.Supp. 321 (N.D.Ala. 1972); Lee v. Resor, 348 F.Supp. 389 (M.D.Fla. 1972).

In Morris, supra, the court provides a helpful analysis of legal issues similar to those in the instant case. That case involved a dam authorized by the Tennessee Valley Authority Act of 1933 (16 U.S.C. § 831c) and completed prior to the enactment of NEPA. Plaintiffs claimed that defendants' operation of Wilson Dam caused the waters of the reservoir to rise and fall, causing refuse matter to accumulate in the sloughs adjacent to plaintiffs'

land. Plaintiffs sought relief under NEPA. The court dismissed this argument in summary fashion, stating:

> ... TVA has made no proposal for such a major action (nor has it taken any such major action) with respect to the matters involved in this case since NEPA became law on January 1, 1970. TVA has simply continued to operate its dams, including Wilson Dam, in accordance with the statutory directive contained in section 9a of the TVA Act. NEPA has no application to agency actions settled long before NEPA's enactment ... (emphasis added).

345 F.Supp. at 324.

In Sierra Club v. Morton, supra, the court reached a similar result.

> With respect to the Delta and Tracy Pumping Plants, it is convenient to distinguish the operation of these facilities up to their present maximum capacities from any future expansion of the two facilities. In regard to the former, plaintiffs vigorously assert that because total annual pumping at both structures will increase in future years to reach their present maximum capacities, these increases alone will be sufficient to require the filing of an EIS. The Court finds this assertion untenable. It is neither

> supported in logic nor by the case law. Although NEPA is applicable to further incremental major federal actions occurring subsequent to its effective date even though a project was initiated prior to that date, once a project is complete, there can be no further major action because at the time of completion, the project was capable of operating at maximum capacity and the agencies intended to operate it at full capacity. See generally Morris v. TVA, 345 F.Supp. 321, 324 (N.D. Ala. 1972). See CEQ Guidelines § 1500.13. If NEPA were construed to require application to ongoing projects which were fully completed prior to January 1, 1970, most federal agencies would become trapped in an endless web of EIS paperwork. Such an interpretation was not intended by Congress and is not supported by the case law.

400 F.Supp. at 645 (emphasis added). Similarly, NEPA was not intended by Congress to trap the continuing operation of Glen Canyon Dam and Lake Powell in an endless web of EIS paperwork once the project was completed and capable of operating at maximum capacity.

Second, the relief sought by plaintiffs is not within defendants' available alterna-

tives. The purpose behind the provisions of 42 U.S.C. §4332(2)(C) which require filing an EIA "on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" is to require that decisions of responsible officials be made after appropriate and careful consideration of environmental aspects of proposed actions. See, e.g., Movement Against Destruction v. Volpe, 361 F.Supp. 1360, 1383 (D. Md. 1973), affirmed, 500 F.2d 29 (4th Cir. 1974). And the courts have consistently interpreted NEPA to require a consideration of alternatives which are reasonable and do not demand what is not meaningfully possible. Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir.), cert. denied, 414 U.S. 1052, 94 S.Ct. 558, 38 L.Ed.2d 341 (1973); I-291 Why? Association v. Burns, 372 F.Supp. 223 (D. Conn. 1974), aff'd, 517 F.2d 1077 (2nd Cir. 1975); City of Romulus v. Wayne County, 392 F.Supp.

578 (D.C. Mich. 1975).

Preparation at this time of a site-specific EIS on the operation of Glen Canyon Dam would be of no benefit to the plaintiff because there are no reasonable alternatives which would afford plaintiffs the relief they seek. See Friends of the Earth v. Armstrong, supra. Since, for reasons which have already been discussed, withdrawal of Lake Powell from the monument or the construction of protective works is no longer meaningfully possible, analysis of these alternatives would be only a "hollow exercise." See Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 146 U.S.App.D.C. 33, 52, 449 F.2d 1109, 1128 (1971). Wherefore,

IT IS HEREBY ORDERED that the motions for summary judgment of the respective defendants are granted and, in accordance with the above opinion, the motion to strike the affidavit and monograph of Karl W.

Luckert is moot.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

LAMARR BADONI, TEDDY HOLIDAY BETTY HOLIDAY, JESSIE YAZZIE BLACK, JIMMY GOODMAN, BEGAY BITSINNIE, SHONTO CHAPTER OF THE NAVAJO NATION, NAVAJO MOUNTAIN CHAPTER OF THE NAVAJO NATION, and INSCRIPTION HOUSE CHAPTER OF THE NAVAJO NATION,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 78-1517
R. KEITH HIGGINSON, Commissioner, Bureau of Reclamation; RONALD H. WALKER, Director, National Park Service; CECIL V. ANDRUS, Secretary of the Interior,	)	
Defendants-Appellees,	)	
STATE OF UTAH; CENTRAL UTAH WATER CONSERVANCY DISTRICT; COLORADO RIVER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; and STATE OF COLORADO,	)	
Defendants in Intervention-Appellees.	)	

Appeal from the United States District Court For the District of Utah
(D.C. No. C 74-275)

Before McWILLIAMS, BREITENSTEIN and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal from an order granting summary judgment, which effectively denied relief to Indian plaintiffs making constitutional and statutory claims against federal officials. We are asked to determine whether the religion clauses of the First Amendment apply to the government's management of the Rainbow Bridge National Monument and the Glen Canyon Dam and Reservoir, and whether an environmental impact statement concerning operation of the Glen Canyon Dam and Reservoir is required under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. The trial court's order and opinion is reported at 455 F.Supp. 641 (D. Utah 1977).

The Rainbow Bridge National Monument is a 160-acre tract of land in southern

Utah, set aside by executive order for scientific and historical purposes. 36 Stat. 2703 (1910). Within this parcel is Rainbow Bridge, a great sandstone arch 309 feet high with a span of 278 feet. The Monument, which is surrounded by the Navajo Reservation, is administered by the National Park Service. Glen Canyon Dam, located on the Colorado River fifty-eight miles below the Monument, is a 710-foot high structure built pursuant to Congressional authorization. 1/ See 43 U.S.C. § 620. Glen Canyon Reservoir, known as Lake Powell, formed behind the dam after its completion in 1963. By 1970 the lake had entered the 160-acre tract of the Monument and by 1977 the water had a peak depth of 20.9 feet directly under the Bridge. If the lake fills to its maximum capacity, the water apparently will

1/ For a comprehensive description of the statutory scheme governing Glen Canyon Dam and Reservoir, see Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974).

be 46 feet deep under the Bridge.

Glen Canyon Dam and Lake Powell are operated by the Bureau of Reclamation under the direction of the Secretary of the Interior. 43 U.S.C. § 620. The federal lands adjacent to Lake Powell, other than the Monument, comprise the Glen Canyon National Recreation Area, see 16 U.S.C. § 460dd, and are administered by the National Park Service. See id. §§ 1, 460dd-3.

Prior to the creation of Lake Powell, Rainbow Bridge National Monument was isolated and was visited by few tourists. The lake now provides convenient access to the Monument. Boats licensed by the Commissioner of the Bureau of Reclamation and the Director of the National Park Service bring tourists to the Monument. Docking facilities have been constructed near the Bridge to serve tour boats and private boats. 2/

(Footnote 2/ on next page.)

Visitors to the Monument are subject to the regulation and control of the National Park Service. See 16 U.S.C. § 1 et seq.

The individual plaintiffs are Indians residing in the general area of Rainbow Bridge National Monument in southern Utah and are enrolled members of the Navajo Tribe. Three of these plaintiffs are recognized among their people as medicine men, "religious leaders of considerable stature among the Navajo, learned in Navajo history, mythology and culture, and practitioners of traditional rites and ceremonies of ancient origin." 455 F.Supp. at 642. Three plaintiffs are Navajo chapters, which are local organizations of the Navajo Nation, each consisting of the adult members of its respective community.

2/ The Park Service also permitted operation of a floating marina near the Bridge. The government states, however, that the marina has been moved to a different canyon. Appellee's Br. 20 n.6.

In 1974 plaintiffs commenced this action for declaratory and injunctive relief against the Secretary of the Interior, the Commissioner of the Bureau of Reclamation and the Director of the National Park Service. 3/ In their amended complaint plaintiffs asserted two claims for relief relevant to this appeal: First, that defendants' operation of Glen Canyon Dam and Reservoir and management of Rainbow Bridge National Monument violated plaintiffs' rights under the Free Exercise Clause of the First Amendment; second, that defendants are required by 42 U.S.C. § 4332(2)(c) to provide an environmental impact statement concerning the operation of Glen

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3/ The court also granted motions of the Colorado River Water Conservation District, the Southwestern Water Conservation District, the State of Colorado, the State of Utah, and the Central Utah Water Conservancy District to intervene. The interests of these intervenors concern only the operation of Glen Canyon Dam and Reservior. In this appeal, their arguments are substantially the same as those presented by the government.

Canyon Dam and Reservoir and that the continuing operation of the Dam and Reservoir without such a statement violates 42 U.S.C. §§ 4221-35. After consideration of the pleadings, affidavits and discovery documents in the record, the trial court granted defendants' motions for summary judgment, from which this appeal was taken.

I.

In essence, plaintiffs' free exercise claim is that government action has infringed the practice of their religion in two respects: (1) by impounding water to form Lake Powell, the government has drowned some of plaintiffs' gods and denied plaintiffs access to a prayer spot sacred to them; and (2) by allowing tourists to visit Rainbow Bridge, the government has permitted desecration of the sacred nature of the site and has denied plaintiffs' right to conduct religious ceremonies at the prayer spot.

The trial court gave two reasons for

granting summary judgment against plaintiffs. First, the court ruled that plaintiffs do not have a cognizable free exercise claim because they have no property interest in the Monument. 455 F.Supp. at 644-45. In the alternative, it held that the federal government's interests in the Glen Canyon Dam and Reservoir as a major water and power project outweigh plaintiffs' religious interests in the Monument. 455 F.Supp. at 645-47. While we affirm the summary judgment in defendants' favor, our reasoning differs somewhat from that of the trial court.

At the outset, we reject the conclusion that plaintiffs' lack of property rights in the Monument is determinative. The governmental must manage its property in a manner that does not offend the Constitution. See Sequoyah v. TVA, 620 F.2d 1159, 1164 (6th Cir. 1980) (lack of property interest not conclusive, but is a factor in

weighing free exercise and competing interests). We must look to the nature of the government action and the quality of plaintiffs' positions to determine whether they have stated a free exercise claim. See Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

Analysis of a free exercise claim involves a two-step process. We first determine whether government action creates a burden on the exercise of plaintiffs' religion. "[I]t is necessary in a free exercise case to show the coercive effect of the enactment as it operates against ... the practice of [their] religion." School Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963). The practice allegedly infringed upon must be based on a system of belief that is religious, see, e.g., Wisconsin v. Yoder, 406 U.S. at 215-16; Kennedy v. Meachum, 540 F.2d 1057, 1060-61 (10th Cir. 1976), and sincerely held by the person asserting the infringement, see, e.g.,

United States v. Ballard, 322 U.S. 78 (1944). If such a burden is found, the action is violative of the Free Exercise Clause, unless the government establishes an interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause", Wisconsin v. Yoder, 406 U.S. at 214. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Id. at 215.

In reviewing a summary judgment, we view the facts and reasonable inferences drawn therefrom in the light most favorable to plaintiffs. The pertinent facts in this case are as follows. Rainbow Bridge and a nearby spring, prayer spot and cave have held positions of central importance in the religion of some Navajo people living in that area for at least 100 years. These shrines are regarded as the incarnate forms

of Navajo gods, which provide protection and rain-giving functions. For generations Navajo singers have performed ceremonies near the Bridge and water from the spring has been used for other ceremonies. Plaintiffs believe that if humans alter the earth in the area of the Bridge, plaintiffs' prayers will not be heard by the gods and their ceremonies will be ineffective to prevent evil and disease. Because of the operation of the Dam and Lake Powell, the springs and prayer spot are under water. Tourists visiting the sacred area have desecrated it by noise, litter and defacement of the Bridge itself. Because of the flooding and the presence of tourists, plaintiffs no longer hold ceremonies in the area of the Bridge.

A

With respect to the government action of impounding water in Lake Powell the stated infringement is the drowning of the Navajo gods, the increased tourist presence

attributable to the level at which the lake is kept, and the denial of access to the prayer spot now under water. We agree with the trial court that the government's interest in maintaining the capacity of Lake Powell at a level that intrudes into the Monument outweighs plaintiffs' religious interest. This Court has previously considered the importance of the Glen Canyon Dam and Reservoir as a crucial part of a multi-state water storage and power generation project. See Friends of the Earth v. Armstrong, 485 F.2d (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974). In the instant case unrebutted evidence, by affidavit, shows that the storage capacity of the lake would be cut in half if the surface level were dropped to an elevation necessary to alleviate the complained of infringements. The required reduction would significantly reduce the water available to the Upper Basin States of Colorado, New Mexico,

Utah and Wyoming from the Colorado River.

> Such a reduction of use in each of the above Upper Colorado River Basin States would among other things limit and reduce the development of water supplies within these States on either a long-term basis for irrigation purposes, for development of mineral and other natural resources, and for municipal and industrial water supplies.

Aff. of David L. Crandall, Regional Director of the Upper Colorado Region of the Bureau of Reclamation. Moreover, it is reasonable to conclude that no action other than reducing the water level would avoid the alleged infringement of plaintiffs' beliefs and practices. In these circumstances we believe the government has shown an interest of a magnitude sufficient to justify the alleged infringements. 4/

4/ Because we agree with the trial court that the government's interest in maintaining the level of Lake Powell is compelling, we do not reach the question whether the government action involved infringes plaintiffs' free exercise of religion.

B

The second basis for plaintiffs' free exercise claims concerns management of the Monument by the National Park Service. Specifically, plaintiffs assert that tourists visiting the Monument desecrate the area by noisy conduct, littering and defacement of the Bridge and that the presence of tourists prevents plaintiffs from holding ceremonies near the Bridge.

The gravamen of plaintiffs' claim is that by permitting public access and the operation of commercial tour boats the government has burdened the practice of plaintiffs' religion. In their complaint plaintiffs seek an order requiring the government officials "to take appropriate steps to operate Glen Canyon Dam and Reservoir in such a manner that the important religious and cultural interests of Plaintiffs will not be harmed or degraded," and "to issue rules and regulations to take

adequate measures preventing further desecration and destruction of the Rainbow Bridge area by tourists, and otherwise to take adequate measures to preclude impairment of the Rainbow Bridge National Monument." [R. 543] In their brief-in-chief, plaintiffs state they "seek only some measured accommodation to their religious interest, not a wholesale bar to use of Rainbow Bridge by all others." [Appellants' Br. 8.] They suggest some specific types of relief, such as prohibiting consumption of beer at the Monument and closing the Monument on reasonable notice when religious ceremonies are to be held there. [Appellants' Br. 25.] In their reply brief, plaintiffs summarize their claim as follows: "The main thrust of appellants' claim seeks to eliminate government actions which encourage destructive visitor use of the Bridge, and to permit, on infrequent occasions, appellants or other Navajos to con-

duct religious ceremonies there in private." [Appellants' Reply Br. 3.]

Free exercise claims generally challenge government dictates which compel citizens to violate tenets of their religion; see Wisconsin v. Yoder, 406 U.S. 205 (1972) (Wisconsin's compulsory education law violated Amish free exercise of religion); Wooley v. Maynard, 430 U.S. 705 (1977) (statute requiring all motor vehicles of New Hampshire to bear the motto "Live Free or Die" violated Jehovah's Witness followers' First Amendment rights), or government action which conditions a benefit or right on renunciation of a religious practice. See McDaniel v. Paty, 435 U.S. 618, 633-34 (1978) (Tennessee provisions barring ministers from serving as delegates or legislators violated the First Amendment); Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification of appellant from unemployment compensation because of refusal to work on

Saturday contrary to religious beliefs violated Free Exercise Clause).

The government here has not prohibited plaintiffs' religious exercises in the area of Rainbow Bridge; plaintiffs may enter the Monument on the same basis as other people. It is the presence of tourists at the Monument and their actions while there that give rise to plaintiffs' complaint of interference with the exercise of their religion. We are mindful of the difficulties facing plaintiffs in performing solemn religious ceremonies in an area frequented by tourists. But what plaintiffs seek in the name of the Free Exercise Clause is affirmative action by the government which implicates the Establishment Clause of the First Amendment. They seek government action to exclude others from the Monument, at least for short periods, and to control tourist behavior.

Unquestionably the government has a

strong interest in assuring public access to this natural wonder. Congress has charged the Park Service with the duty to provide "for the enjoyment of [parks and monuments] ... by such means as will leave them unimpaired for the enjoyment of future of the generations." 16 U.S.C. § 1. Toward this end, the Secretary of the Interior is empowered to

> grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations provided for under section2 of this title, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public ...

16 U.S.C. § 3. The Park Service's action of allowing public access to Monument in accordance with this legislative grant provides the legal basis for plaintiffs' presence as well as the presence of the tourists.

Issuance of regulations to exclude tourists completely from the Monument for the avowed purpose of aiding plaintiffs' conduct of religious ceremonies would seem a clear violation of the Establishment Clause.

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement of inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

School Dist of Abington v. Schempp, 374 U.S. at 222. Exercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area. Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969); Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 320 (1968); Cox v. Louisiana, 379 U.S.

536, 554-55 (1965); Niemotko v. Maryland 340 U.S. 268, 271 (1951). Government action has frequently been invalidated when it has denied the exercise of First Amendment rights compatible with public use.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it it not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. CIO, 307 U.S. 496, 515-16 (1939). We find no basis in the law for ordering the government to exclude the public from public areas to insure privacy during the

exercise of First Amendment rights.

We must also deny relief insofar as plaintiffs seek to have the government police the actions of tourists lawfully visiting the Monument. Although Congress has authorized the Park Service to regulate the conduct of tourists in order to promote and preserve the Monument, see 16 U.S.C. §§ 1, 3, we do not believe plaintiffs have a constitutional right to have tourists visiting the Bridge act "in a respectful and appreciative manner." [Appellants' Reply Br. 4.]

> The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. ... We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life.

Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953) (Learned Hand, J.) (foot-

note omitted). Were it otherwise, the Monument would become a government-managed religious shrine.

The Park Service already has issued regulations applicable to the Monument prohibiting disorderly conduct, 36 C.F.R. § 2.7 (1979), intoxication and possession of alcoholic beverages by minors, id. § 2.16, defacement, id. § 2.20, littering, id. § 2.24, and tampering with personal property, id. § 2.29. These regulations no doubt would be justified as authorized under its charge to conserve and protect the scenery, natural and historic objects for the enjoyment of the public. See 16 U.S.C. § 1. These regulations also provide the relief plaintiffs request as to control of tourist behavior, except perhaps for a total ban on beer drinking.

What of the request stated in the appellants' reply brief for access "on infrequent occasions" to conduct religious

ceremonies in private? The government asserts that plaintiffs, in common with other members of the public, may apply for a public assembly permit to hold religious ceremonies at the Bridge. 5/ No one suggests such a permit could not be used to permit access after normal visiting hours when privacy might be assured. The courts have held permit requirements unconstitutional when they have been used to restrain First Amendment rights without narrow, objective standards. E.g., Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). Cf. Chess v. Widmar, ___ F.2d ___ (8th Cir. No. 80-

5/ 36 C.F.R. § 2.21 provides in pertinent part:

> (a) Public meetings, assemblies, gatherings, demonstrations, parades and other public expressions of views are permitted within park areas on lands which are open to the general public provided a permit therefor has been issued by the Superintendent.

"Park area" is defined in the regulations as "all federally owned or controlled areas administered by the National Park Service." 36 C.F.R. § 1.2(f).

1048, Aug. 5, 1980) (use of university facilities). Our problem is that there is no allegation that any such permit was requested and denied. The pleadings, affidavits and interrogatories suggest no specific time or schedule for religious ceremonies. Indeed, plaintiffs' answers to interrogatories and the profferred affidavit of their expert Karl Luckert indicate the ceremonies are infrequent and scheduled at the request of individual Navajos when a need seems to exist.

Plaintiffs cite the Park Service's proposed guidelines for use of Grand Canyon National Park, which prohibit entry on certain sacred Indian religious sites. They also cite the American Indian Religious Freedom Act, 42 U.S.C. § 1996, which states a public policy to permit Indians access to sacred sites for worship, and perhaps to protect them from intrusion. See H.R. Rep. No. 1308, 95th Cong., 2d Sess. (1978),

reprinted in [1978] U.S. Code Cong. & Ad. News 1262, 1264. But we do not have before us the constitutionality of those laws or regulations or of any action taken by defendants in alleged violation of them. The pleadings, even as supplemented by the expanded requests in the brief and supported by the proffered evidence, afford no basis for relief.

II

Plaintiffs also seek an order under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 et seq, requiring the Department of Interior to draft an environmental impact statement (EIS) on the continuing operation of the Glen Canyon Dam and Reservoir. Alternatively, plaintiffs seek a remand to the district court for trial on this issue. The district court held that the issue was not ripe for judicial review because the agency had not taken a position of sufficient clarity and finality to allow meaningful judicial

review. 455 F.Supp. at 648. It also stated that if the issue were ripe for decision an EIS would not be required because operation of the dam involves merely ministerial rather than major federal actions and because no reasonable alternatives would afford relief to plaintiffs. Id. at 648-49.

The government now appears to concede the issue is ripe for judicial review, because the Bureau has decided to draft a comprehensive EIS for the entire Colorado River Basin Project. It has also determined that a site-specific EIS on the Glen Canyon unit is not necessary. [Appellees' Brief 24-26.] Thus, we must determine whether the agency's decision not to draft a site-specific EIS for the dam and reservoir is reasonable. 6/ See Wyoming Outdoor

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6/ The choice of standard of review here depends upon how the agency action is characterized. Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976), requires a showing the agency acted "arbitrarily" in choosing the site specific approach rather than requiring

Coordinating Council v. Butz, 484 F.2d 1244, 1248-49 (10th Cir. 1973).

The Colorado River Storage Project Act of 1956, 43 U.S.C. § 620 et seq., authorized Glen Canyon Dam and Reservoir along with other storage facilities and power plants. Construction began on October 15, 1956, and was completed on September 13, 1963. Six months later, water was first impounded in the project. In September 1968, Congress instructed the Secretary of Interior to promulgate criteria for the storage and release of the water from the Colorado River Project. 43 U.S.C. § 1552(a). The operational criteria were published on June 10, 1970, shortly after NEPA's effective date of January 1, 1970.

(6/ cont.) a region-wide EIS. Arguably, that standard should apply to the instant case, which would make plaintiffs' task more difficult. For purposes of this appeal we give plaintiffs the benefit of the doubt and apply the "reasonableness" standard.

NEPA requires that federal agencies include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Bureau apparently agrees with plaintiffs that the continuing operation of the Colorado River Basin Project is a major federal action since it has decided to draft a comprehensive EIS on the entire project. Disagreement between plaintiffs and the Bureau arises because plaintiffs believe an additional site-specific EIS on the Glen Canyon unit is necessary.

The criteria in question apply not only to the Glen Canyon unit, but also to all the storage units of the Colorado River Project constructed and operated under three related acts. 7/ The title, "Criteria for Coordi-

7/ These acts are: the Colorado River Storage Project Act, 43 U.S.C. § 620 et seq.; the Boulder Canyon Project Act, 43 U.S.C.

nated Long-Range Operation of Colorado River Reservoirs," reflects the comprehensive scope of the criteria set by direction of Congress. See 43 U.S.C. § 1552(a). This Court has recognized the inter-related and comprehensive development of the water resource project. Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974).

> Lake Powell is an important element or link in the Colorado River water and power development. It cannot be considered alone as all the existing projects in the Upper Basin, and the planned ones, are interrelated and interdependent. The projects have different purposes and functions, but are dependent on Lake Powell to provide basic storage necessary to fulfill the delivery requirements to the downstream states and Mexico, especially in dry years ... This interrelation created by the comprehensive plan for development is rather delicate and can be disturbed if the capacity of by far the largest storage or regulating unit is reduced significantly.

(7/ cont.) § 617 et seq.; and the Boulder Canyon Project Adjustment Act, 43 U.S.C. § 618 et seq.

Id. at 6. We also note that Congress expressly declared that the purpose of the Act which required criteria was the "further comprehensive development of the water resources of the Colorado River Basin." 43 U.S.C. § 1501(a).

Although a comprehensive EIS is frequently undertaken after project or site-specific EIS's have been drafted, need for a comprehensive EIS does not automatically establish need for environmental statements of narrower scope. See Kleppe v. Sierra Club, 427 U.S. 390, 410-12 (1976). We find no proposal for criteria or any other major action under NEPA which involves the Glen Canyon project singly; rather it is for the entire Colorado River Basin Project. We therefore find the agency's decision to draft a comprehensive EIS considering the environmental effects of the entire project and its related decision not to draft a site-specific EIS on the Glen Canyon unit

were reasonable. The district court correctly granted judgment against plaintiffs on this issue.

AFFIRMED.

NOVEMBER TERM - DECEMBER 9, 1980

Before The Honorable Oliver Seth, Chief Circuit Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

LAMARR BADONI, TEDDY HOLIDAY BETTY HOLIDAY, JESSIE YAZZIE BLACK, JIMMY GOODMAN, BEGAY BITSINNIE, SHONTO CHAPTER OF THE NAVAJO NATION, NAVAJO MOUNTAIN CHAPTER OF THE NAVAJO NATION, and INSCRIPTION HOUSE CHAPTER OF THE NAVAJO NATION,	)	
Plaintiffs-Appellants,	)	No. 78-1517
vs.	)	(D.C. No. C 74-275
R. KEITH HIGGINSON, Commissioner, Bureau of Reclamation; RONALD H. WALKER, Director, National Park Service; CECIL D. ANDRUS, Secretary of the Interior,	)	
Defendants-Appellees,	)	
STATE OF UTAH; CENTRAL UTAH WATER CONSERVANCY DISTRICT; COLORADO RIVER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; and STATE OF COLORADO,	)	
Defendants in Intervention-Appellees.	)	

This matter comes on for consideration

of appellants' petition for rehearing and suggestion for rehearing in banc in the captioned case. The court also has for consideration a memorandum of various Indian tribes in support of the petition, together with a motion of these tribes to appear and file the memorandum as amici curiae.

Upon consideration thereof, it is ordered by the hearing panel that the amici memorandum shall be filed as of November 24, 1980.

The petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure,

the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By:
Robert L. Hoecker
Chief Deputy Clerk

MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1688

In the Supreme Court of the United States

OCTOBER TERM, 1980

LAMARR BADONI, *et al.*,

Petitioners,

v.

R. KEITH HIGGINSON, *et al.*,

Respondents.

and

STATE OF UTAH, *et al.*,

Respondents-Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May 6, 1981

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No. 80-1688

In the Supreme Court of the United States

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LAMARR BADONI, *et al.*,

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STATE OF UTAH, *et al.*,

Respondents-Intervenors.

BRIEF OF THE STATE OF UTAH, THE CENTRAL UTAH WATER CONSERVANCY DISTRICT, THE STATE OF COLORADO, THE COLORADO RIVER WATER CONSERVATION DISTRICT, AND THE SOUTHWESTERN WATER CONSERVATION DISTRICT

INTRODUCTION AND SUMMARY OF RESPONDENTS-INTERVENORS' POSITION

Petitioners seek a Writ of Certiorari from this Court to review the Decision of the United States Court of Appeals for the Tenth Circuit in this case, wherein a unanimous Court rejected Petitioners' claims for relief, which claims were predicated upon the exercise of their

religious beliefs under the First Amendment to the United States Constitution.

Respondents-Intervenors were concerned when this litigation was initiated because the claims asserted by Petitioners threatened to substantially interfere with the operation of Lake Powell and the development of water in the Upper Colorado River Basin. To protect their interests, Respondents-Intervenors petitioned the Court to permit intervention. However, as is pointed out in the following section of this Brief, it now appears that the threat to the interests of Respondents-Intervenors may be moot because the relief Petitioners now appear to be seeking is limited to matters other than restricting the operation of Lake Powell. However, unless and until this issue is formally removed from this action, Respondents-Intervenors must continue to oppose Petitioners' claims. Even though the focus of this Brief will be directed primarily toward those aspects of the Decision of the lower court which relate to the operation of Lake Powell, Respondents-Intervenors desire to make it clear that they do not believe Petitioners have presented a basis for certiorari on any facet of the lower court's Decision.

Respondents-Intervenors generally concur with Petitioners' statements with respect to jurisdiction, parties, and the constitutional provisions involved, but disagree that this is an appropriate case for certiorari.

The real question in this case is whether, based upon the specific facts and evidence presented to the

trial court, Petitioners have a cognizable claim for relief under the First Amendment to the United States Constitution. Respondents-Intervenors contend that under the facts of this case and the clear pronouncements of this Court, Petitioners' claim must fail. The narrow question presented in this action does not raise the broad spectrum of issues which both Petitioners and *Amici Curiae* have suggested in an effort to capture the concern and sympathy of this Court. With respect to the Brief proposed by *Amici Curiae,* Respondents-Intervenors oppose the appearance of *Amici Curiae* in this action and believe that the range of matters which they seek to advance here are improper in this action and are not necessitated by the ruling of the lower court.

This Brief is submitted jointly by the State of Utah, the Central Utah Water Conservancy District, the State of Colorado, the Colorado River Water Conservation District and the Southwestern Water Conservation District, all of whom were Defendants-in-Intervention before the trial court and are referred to herein as Respondents-Intervenors.

THE INTERESTS OF RESPONDENTS-INTERVENORS MAY BE MOOT

As noted above, it now appears that Petitioners have limited the relief they are seeking to matters other than restricting storage or the manner of operation of Lake Powell. If this had been done in the original Complaint, Respondents-Intervenors would not have sought intervention. The method of operation of Rainbow Bridge National Monument is of no direct concern

to these Respondents-Intervenors so long as their rights under the Colorado River Compact, the Upper Colorado River Basin Compact, and legislation providing for the development of water projects on the Colorado River System are not impaired.

Petitioners' Complaint alleged three separate causes of action. The First Cause of Action alleged that Petitioners' right to religious freedom under the First Amendment and their right to be secure in their property under the Fifth Amendment were being violated by the encroachment of the waters of Lake Powell into the Rainbow Bridge National Monument and by visits of tourists and other non-Indians to Rainbow Bridge.

The Second Cause of Action alleged that Section 1 of the Colorado River Storage Project Act (43 U.S.C. §620) was designed to protect the religious beliefs of Petitioners and their interest in Rainbow Bridge by requiring that adequate protective measures be taken to prevent the waters of Lake Powell from entering Rainbow Bridge National Monument.

The Third Cause of Action alleged that the operating criteria for Glen Canyon Dam and Lake Powell must be subjected to an environmental impact study and statement under the mandate of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. §4332(2)(C)).

At page 13, footnote 6 of their Petition for Writ of Certiorari, Petitioners state that their Second and Third

Causes of Action have either been abandoned or become moot, and they seem to have restricted their claim under the First Cause of Action to a request that the Federal Government merely operate Rainbow Bridge National Monument in such a way as to reduce or minimize conflicts between visitors to the Monument and the exercise by Petitioners of certain religious practices.

To illustrate, Petitioners go to great lengths in discussing the course of this litigation to focus the Court's attention on relief other than the lowering of Lake Powell, and are critical of both Respondents and the lower court for what they believe is undue emphasis on this issue (Petition, pp. 14-16). Petitioners then proceed to emphasize that they are seeking lesser measures than that of lowering Lake Powell. For example, at pages 19-20, Petitioners state:

> Petitioners had suggested that various measures involving limitations on tourist activity at the Monument—all of which measures fell far short of lowering the level of Lake Powell—could and should be considered. Among the measures mentioned in the pre-trial order in the District Court and in Petitioners' brief in the Court of Appeals were occasionally closing the Monument to allow ceremonies to be held, prohibiting the use of alcohol and other sacrilegious activity, moving the floating marina, and more strictly limiting tourist visitation.

Further, Petitioners correctly state, with seeming acquiescence, that both the District Court and the Court of Appeals firmly rejected the lowering of Lake Powell as a form of relief (Petition, footnote 11, p. 19).

Petitioners subsequently state, at page 23 that:

> In the instant case, no otherwise unlawful *or even extraordinary steps are sought.* . . . (Emphasis added).

Obviously, the lowering of Lake Powell would be an extraordinary step with disastrous consequences to the rights of Respondents-Intervenors to develop the waters of the Colorado River. Finally, in the Conclusion of their Petition, Petitioners urge that less drastic remedies would be adequate to provide the relief which they seek:

> There are remedies available both modest and feasible that would substantially lessen the burdens on Petitioners' religion. (Petition, p. 38).

Measures such as those now requested by Petitioners, if adopted by the Federal Respondents, probably would violate the Establishment Clause of the First Amendment, but would not in any way threaten the operation of Lake Powell or Glen Canyon Dam, or the operating criteria for the facility, and would appear in no way to threaten the interests of Respondents-Intervenors in their development and use of the waters of the Colorado River.

Therefore, the interests which Respondents-Intervenors sought to protect by intervention in this action appear to no longer be threatened, so long as Petitioners' claims are confined to the relief requested in their Petition for Writ of Certiorari. However, Respondents-Intervenors believe that even the modified claims of Peti-

tioners are not cognizable in a court of law and that the judgment of the lower court was in all respects correct.

SUPPLEMENTAL STATEMENT OF THE CASE

The following facts were conceded in the lower court and are not controverted in this proceeding. On May 30, 1910, President William H. Taft created the Rainbow Bridge National Monument by proclamation in accordance with authority conferred upon him by the Act of June 8, 1906, 16 U.S.C. §431. The Monument contains 160 acres, on which is situated Rainbow Bridge, believed to be the world's largest natural bridge.

The Bridge is a sandstone arch 309 feet high, with the arch columns situated on either side of Bridge Creek, for a total span of 278 feet. The Monument is located in Bridge Canyon, a side canyon south of and tributary to the main stem of the Colorado River.

The 160-acre Monument has never been a part of the Navajo Reservation. The original Navajo Reservation was created in 1868 by Treaty (15 Stat. 667), but encompassed only land areas located in Arizona. Twenty years later, an area in Utah adjacent to the Reservation and commonly known as the Paiute Strip was "withheld from sale and settlement and set apart as a reservation for Indian purposes" by Executive Order of May 17, 1884. Then, eight years later, the Paiute Strip was believed to have mineral potential and was restored to the public domain by Executive Order of November 19, 1892.

This "yo-yo" program continued, with the Paiute Strip alternately being reserved for Indian use and then being restored to the public domain, until March 1, 1933, when it became part of the Navajo Reservation (47 Stat. 418). However, from and after creation of the Rainbow Bridge National Monument in 1910, none of the reservations or restorations purported to affect the Monument, and since its creation it has always been held in federal ownership as a National Monument. It is part of the National Park System administered by the National Park Service.

Glen Canyon Dam, authorized in 1956 by P.L. 84-485 (43 U.S.C. §620, *et seq.*), is 710 feet in height and is located about fifty-eight miles downstream from Rainbow Bridge on the main stem of the Colorado River. It is a fundamental feature of the Colorado River Storage Project, and is designed to serve multiple-purpose functions, including irrigation, recreation, river regulation, municipal and industrial uses, and generation of hydroelectric power.

Glen Canyon Dam impounds water in Lake Powell, which has a total storage capacity of 27,000,000 acre-feet. The elevation of the Reservoir at full capacity is 3,700 feet above mean sea level. The lowest elevation of the 160-acre tract constituting the Rainbow Bridge National Monument (upstream fifty-eight miles from the Dam), is 3,606 feet above mean sea level. Approximately one-half of the total storage capacity of the Reservoir is between the elevations of 3,600 and 3,700 feet. Thus, nearly one-half of the total storage capacity

of the Reservoir is dependent upon utilizing the storage space located above the lower boundary of the Monument (the area between elevations 3,606 and 3,700).

Obviously, it was necessary either to (1) build some protective device to prevent the water from entering the Monument as the Reservoir filled to an elevation of 3,700 feet above mean sea level, or (2) allow the rising level of the Reservoir to invade the Monument area. Congress originally selected the first alternative by providing in Section 1 of the Colorado River Storage Project Act (43 U.S.C. §620) that:

> . . . the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument.

Thereafter, Congress changed its mind, and selected the second alternative of allowing water to enter the 160-acre tract constituting the Monument, as was clearly decided in *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert denied* 94 S.Ct. 933 (Jan. 21, 1974). However, as the court pointed out in that action, even when Lake Powell is filled to its designed capacity, the water within the monument is confined to the channel of Bridge Creek beneath Rainbow Bridge:

> . . . When the water level of Lake Powell reaches the level of 3,700 feet above sea level, which is the maximum design capacity for Glen Canyon Dam, the reservoir water will be standing in the inner gorge of the creek under the Rainbow Bridge Arch. At this level the water will there have a depth of about forty-eight feet, but will

> not rise enough to get out of the gorge or to reach the base of the Rainbow Bridge Arch since this point is some twenty-five feet above that level. The water, however, would then be well within the boundaries of the Monument although confined in the inner gorge of the creek. (485 F.2d at 3).

At this juncture some brief explanation is in order with respect to Navajo lands that were acquired by the Federal Government for Glen Canyon Dam and Lake Powell. Even though Rainbow Bridge National Monument is not and has never been part of the Navajo Reservation, the "Paiute Strip" was made part of the Reservation in 1933. This Strip included areas that would be inundated by Lake Powell, and there were also areas in Arizona that were part of the Reservation which were needed for the Reservoir and related facilities. Accordingly, Congress took steps to acquire two categories of land that were part of the Navajo Reservation in exchange for other lands. Parcel A was that part of the Reservation which included and surrounded the "federal" community of Page, Arizona, located at the Dam site, and Parcel B extended upstream from Parcel A so as to include all Reservation lands located below the elevation of 3,720 feet above mean sea level, terminating at the San Juan River. This elevation was 20 feet higher than the maximum designed elevation of the Reservoir (see P.L. 85-868, 72 Stat. 1686).

Thus, it was only logical that some agreement be negotiated with the Navajo Tribe with respect to the development of lands adjacent to the Reservoir. Such a Memorandum of Agreement was entered into in 1970

between the National Park Service, the Bureau of Reclamation, the Bureau of Indian Affairs, and the Navajo Tribe (a copy of this Agreement is attached to the Answer of the Federal Defendants). That Agreement generally concerned development of the Glen Canyon National Recreation Area and adjacent tribal lands, and it specifically provided for the location of the Rainbow Bridge Marina (see paragraphs 23 and 24 of said Agreement). However, nothing was said in that Agreement about any religious significance which Rainbow Bridge might have had to the Navajo Tribe or to individual members of the Tribe. To the contrary, it is clear that the Agreement contemplated development of tourist facilities to accommodate visitors to Rainbow Bridge.

With respect to regulatory controls for operating Lake Powell and Glen Canyon Dam, it is important to note that these controls are part of the criteria for the "Coordinated Long-Range Operation of Colorado River Reservoirs". The criteria primarily relating to water releases from, and water levels in, Lake Powell were promulgated under the congressional direction contained in P.L. 90-537, 82 Stat. 900, 43 U.S.C. §1552. The statute required releases in accordance with specific conditions, taking into account the Colorado River Compact (46 Stat. 3000), the Upper Colorado River Basin Compact (63 Stat. 31), and the Mexican Water Treaty (59 Stat. 1219). The important observation is that these criteria clearly and explicitly control the operation of Lake Powell and the water levels impounded therein, and the Secretary of Interior has no authority or dis-

cretion to act in any way contrary to the congressional guidelines.

ARGUMENT: THERE HAS BEEN NO INTERFERENCE WITH THE CONSTITUTIONAL RIGHTS OF PETITIONERS

Petitioners argue that their right to religious freedom under the First Amendment is being violated by the encroachment of reservoir waters into the Monument area and visits by tourists and non-Indians to Rainbow Bridge. This claim is not based on any cognizable legal theory upon which relief can be granted, as will be shown below.

A. *There has been no Interference with Religious Beliefs*

It will be assumed, *arguendo*, that Rainbow Bridge is a sacred religious shrine to Petitioners, although it seems clear that the Navajo Tribe as a whole perceived no such religious significance when it entered into the Agreement with federal agencies for the development of tourist facilities to serve the Monument area (see Agreement attached to the Answer of Federal Defendants).

Under the First Amendment to the United States Constitution it is unlawful for Congress to make any law respecting an establishment of religion or prohibiting the free exercise thereof. But there has been no violation of that protection in this case. Unquestionably, Petitioners are entitled to embrace any religious views

they wish; but they have not alleged that they have been persecuted or prosecuted under any act of Congress because of their religious beliefs. They simply have alleged that their religious perception of Rainbow Bridge is affronted when the Reservoir is operated according to the operating criteria and when the Monument is used as a National Monument (*i.e.*, non-Indians are encouraged and allowed to visit the Monument). In fact, Petitioners have not even alleged that they have been preventd from conducting religious practices within the Monument.

There is no authority to support Petitioners' argument. While the freedom to embrace a religious belief is absolute, the freedom to take action in accordance with that belief is not (*Cantwell v. Connecticut*, 310 U.S. 296 (1940). See also *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Gillette v. U.S.*, 401 U.S. 437 (1971); *Johnson v. Robinson*, 415 U.S. 361 (1974); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Reynolds v. U.S.*, 98 U.S. 145 (1878); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Torcase v. Watkins*, 367 U.S. 488 (1961); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Loewing v. U.S.*, 392 F.2d 219 (10th Cir. 1968); *U.S. v. Cleveland*, 56 F. Supp. 890 (D. Utah, 1944), *aff'd.* 146 F.2d 730 (10th Cir. 1945); *U.S. Ex rel Goings v. Aaron*, 350 F.Supp. 1 (D. Minn. 1972); and *Gospel Army v. City of Los Angeles*, 163 P.2d 704 (Cal. 1945), *appeal denied* 331 U.S. 534).

Petitioners assert that this case involves a situation

which reflects impairment, hostility and oppression of their religious beliefs (Petition, pp. 18-19, 26-27). This simply is not so. Petitioners have not and cannot point to any facts or evidence to support such a claim. Petitioners have not been denied access to Rainbow Bridge National Monument, nor is this a situation where a group has sought to use public property for a particular event and been refused. Petitioners' claim is much broader than that. Petitioners argue that Lake Powell and the Rainbow Bridge National Monument should be managed in perpetuity in such a manner as to accommodate and further Petitioners' religious beliefs. While Petitioners have modified their claims for relief as this litigation has evolved, they are still seeking a recognition that property which they do not own or control be administered as a religious shrine for their benefit. In other words, Petitioners are seeking special and unique treatment in the furtherance of their religious beliefs at the expense of the rights of other parties to this litigation, in derogation of public access and availability to this National Monument, and also in direct opposition to various acts of Congress which mandate the continued management of this property as has been done in the past. Petitioners cannot obtain the broad sweep of relief they seek under the facts of this case under the First Amendment to the Constitution of the United States or the American Indian Religious Freedom Act (42 U.S.C. §1996). The cases relied upon by Petitioners simply are not analogous to this situation, and the Decision of the lower court is sound that, based upon the facts of this case, the relief sought by Petitioners would violate the Establishment Clause of the First

Amendment (*Stuttlesworth v. Birmingham*, 394 U.S. 149 (1969); *Abington School District v. Schempp, supra;* and *Cox v. Louisiana*, 379 U.S. 536 (1965)).

B. *The Lower Court's Ruling on Lake Powell is Correct*

With respect to that portion of the lower court's Decision dealing with the operation of Lake Powell, the lower court clearly reached the proper result. The unencumbered operation of Lake Powell is critical to water use and development in the Colorado River Basin, and the rights of Respondents-Intervenors in the Colorado River would be significantly and substantially impaired if Lake Powell is not operated as a storage reservoir to carry out its designed purposes. It would serve no useful purpose to review the background, need for and purpose of the Lake Powell Project in great detail, since Petitioners do not challenge this facet of the lower court's Decision nor offer any reason why certiorari should be granted with respect to it. However, they argue that the lower court's Decision should be reversed and the case sent back to the trial court for a factual determination of what alternative relief would be appropriate. But the court would not reach such a question in light of its conclusion that Petitioners were entitled to no relief.

Both the trial court and the court below acknowledged the sincerity of the belief and appropriately viewed the scope of the religious interest in balancing that interest against conflicting state interests, concluding on

the basis of all of Petitioners' statements given in depositions, interrogatories, pleadings and affidavits that the Petitioners' interest was limited to a few medicine men and involved only isolated ceremonies since 1965. Petitioners do not contest the conclusion of the lower court that Respondents' interests in the operation of the Dam and Reservoir in the manner described by statute and regulation was substantial and outweighed the relatively weak showing made by Petitioners. Further, it must be recognized that the lower court reviewed Petitioners' claims and the facts in a light most favorable to Petitioners:

> In reviewing a summary judgment, we view the facts and reasonable inferences drawn therefrom in the light most favorable to plaintiffs. The pertinent facts in this case are as follows. Rainbow Bridge and a nearby spring, prayer spot and cave have held positions of central importance in the religion of some Navajo people living in that area for at least 100 years. These shrines are regarded as the incarnate forms of Navajo gods, which provide protection and rain-giving functions. For generations Navajo singers have performed ceremonies near the Bridge and water from the spring has been used for other ceremonies. Plaintiffs believe that if humans alter the earth in the area of the Bridge, plaintiffs' prayers will not be heard by the gods and their ceremonies will be ineffective to prevent evil and disease. Because of the operation of the Dam and Lake Powell, the springs and prayer spot are under water. Tourists visiting the sacred area have desecrated it by noise, litter and defacement of the Bridge itself. Because of the flooding and the presence of tourists, plaintiffs no longer hold

ceremonies in the area of the Bridge. (Opinion of the Court of Appeals).

The lower court then properly concluded that under the balancing of interests tests set forth in *Wisconsin v. Yoder, supra,* Petitioners could not prevail on their First Amendment claim:

> With respect to the government action of impounding water in Lake Powell the stated infringement is the drowning of the Navajo gods, the increased tourist presence attributable to the level at which the lake is kept, and the denial of access to the prayer spot now under water. We agree with the trial court that the government's interest in maintaining the capacity of Lake Powell at a level that intrudes into the Monument outweighs plaintiffs' religious interest. This Court has previously considered the importance of the Glen Canyon Dam and Reservoir as a crucial part of a multistate water storage and power generation project. *See* Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), *cert. denied,* 414 U.S. 1171 (1974). In the instant case unrebutted evidence, by affidavit, shows that the storage capacity of the lake would be cut in half if the surface level were dropped to an elevation necessary to alleviate the complained of infringements. The required reduction would significantly reduce the water available to the Upper Basin States of Colorado, New Mexico, Utah and Wyoming from the Colorado River.
>
> Such a reduction of use in each of the above Upper Colorado River Basin States would among other things limit and reduce the development of water supplies within these States on either a long-term basis for irrigation purposes, for development of mineral

> and other natural resources, and for municipal and industrial water supplies.
>
> Aff. of David L. Crandall, Regional Director of the Upper Colorado Region of the Bureau of Reclamation. Moreover, it is reasonable to conclude that no action other than reducing the water level would avoid the alleged infringement of plaintiffs' beliefs and practices. In these circumstances we believe the government has shown an interest of a magnitude sufficient to justify the alleged infringements. (Opinion of the Court of Appeals).

It is difficult to see how the lower court could have reached any other result under the facts of this case. Petitioners apparently do not challenge this conclusion, since they advance no argument remotely suggesting that the lower court was in error in reaching this result. The plain fact is that there is simply no justifiable basis for this Court to grant Petitioners any relief which would affect the operation of Lake Powell.

CONCLUSION

It is respectfully submitted that the Decision of the lower court regarding Petitioners' First Amendment claims is correct and proper in all respects, and Petitioners' Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I, David L. Wilkinson, Attorney General of and counsel for the State of Utah, and a member of the Bar of this Court, do hereby certify that three copies of the foregoing **BRIEF OF THE STATE OF UTAH, THE CENTRAL UTAH WATER CONSERVANCY DISTRICT, THE STATE OF COLORADO, THE COLORADO RIVER WATER CONSERVATION DISTRICT AND THE SOUTHWESTERN WATER CONSERVATION DISTRICT, RESPONDENTS-INTERVENORS**, were served by mailing the same, first class postage prepaid, this 6th day of May, 1981, all in accordance with the Rules of this Court, upon each of the following:

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No. 80-1688

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

LAMARR BADONI, ET AL., PETITIONERS

v.

ROBERT BROADBENT, COMMISSIONER, WATER AND POWER RESOURCES SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the federal management of Rainbow Bridge National Monument violates petitioners' rights under the Free Exercise Clause of the First Amendment when the government has not denied or restricted petitioners' opportunity to conduct religious ceremonies at the Monument.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A36-A66) is reported at 638 F. 2d 172. The opinion of the district court (Pet. App. A1-A35) is reported at 455 F. Supp. 641.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1980. A timely petition for rehearing was denied on December 19, 1980. The petition for a writ of certiorari was filed on March 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the management of the Rainbow Bridge National Monument, a 160-acre parcel reserved for scientific and historical purposes by the Pres. Proc. of May 30, 1910, 36 Stat. 2703, which is located near the Navajo Reservation.[1] Rainbow Bridge is a large natural sandstone arch 309 feet high with a span of 278 feet. Glen Canyon Dam is a 710-foot high structure located on the Colorado River, 58 miles below the Rainbow Bridge National Monument. Construction of the dam, authorized by the Colorado River Storage Project Act of 1956, ch. 203, 70 Stat. 105, was completed in 1963, and a reservoir behind the dam, known as Lake Powell, began to fill. By 1977, Lake Powell had reached a depth of 20.9 feet directly under Rainbow Bridge, and if the lake fills to its maximum capacity, water will stand at a depth of 46 feet beneath Rainbow Bridge. The federal lands adjacent to Lake Powell, other than the land within the confines of the Rainbow Bridge National Monument, are administered by the National Park Service as the Glen Canyon National Recreation Area. Act of Oct. 27, 1972, Pub. L. No. 92-593, 86 Stat. 1311, 16 U.S.C. 460dd *et seq.* (Pet. App. A37-A39).

Prior to the creation of Lake Powell, Rainbow Bridge National Monument was fairly isolated and was visited by only a small number of tourists. Lake Powell, however, provides convenient water-borne access to the Monument, which has caused a significant increase in tourist traffic. Visitors to the Rainbow Bridge National Monument are subject to the regulation and control of the National Park Service. 16 U.S.C. 1 *et seq.* In addition, the Park Service

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[1]The land surrounding the Monument was not part of the original Navajo Reservation created by the Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667. This land was added to the Reservation by the Act of Mar. 1, 1933, ch. 160, 47 Stat. 1418, many years after the establishment of the Rainbow Bridge National Monument.

licenses commercial tour operators who provide water transport to the Monument and has granted a concession to a floating marina located near the Monument (Pet. App. A39-A40).[2]

2. Petitioners maintain that the Rainbow Bridge and its surroundings are a sacred site at which religious ceremonies must be performed occasionally. They brought this action for declaratory and injunctive relief against several officers of the Department of the Interior contending that the operation of the Glen Canyon Dam and the management of Rainbow Bridge National Monument unlawfully interfered with the free exercise of their religion in violation of the First Amendment.[3] First, they stated that the waters of Lake Powell had inundated sacred sites on Monument property. Second, petitioners claimed that the numbers and conduct of tourists visiting the Monument prevented them from conducting religious services. The complaint requested an injunction ordering the defendant officials " 'to take appropriate steps to operate Glen Canyon Dam and Reservoir in such a manner that the important religious and cultural interests of [petitioners] will not be harmed or degraded,' " and " 'to issue rules and regulations to take adequate measures preventing further desecration and destruction of the Rainbow Bridge area by tourists, and otherwise to take adequate measures to preclude impairment of the Rainbow Bridge National Monument' " (Pet. App. A49-A50).

The district court ruled that the public interest in operating Glen Canyon Dam and Lake Powell up to its intended capacity outweighed petitioners' claims under the Free

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[2]Establishment of this marina was specifically approved in a 1970 memorandum of understanding between the Department of the Interior and the Navajo Tribe.

[3]The complaint also alleged violations of the Colorado River Storage Project Act, *supra*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*

Exercise Clause to a lower water level (Pet. App. A20-A23). The court also noted that Rainbow Bridge National Monument had never been a part of the Navajo Reservation and ruled that the petitioners' lack of a property interest in the Monument was dispositive of their Free Exercise Clause claims (*id.* at A10-A11).[4]

The court of appeals affirmed on a different rationale than that adopted by the trial court. The court of appeals rejected the conclusion that petitioners' lack of a property interest in the Monument was determinative, finding that "[t]he government[] must manage its property in a manner that does not offend the Constitution" (Pet. App. A43). In the court's view, the question is whether the government

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[4]The district court also ruled against petitioners' claims concerning Section 1 of the Colorado River Storage Project Act, *supra* (Pet. App. A23-A25). With respect to the NEPA claim, the court held that the question whether the Interior Department was in violation of the statute was not yet ripe for judicial review because no administrative decision had been made on whether an Environmental Impact Statement (EIS) would be prepared on the operation of Glen Canyon Dam (*id.* at A29). In the alternative, the district court ruled that operation of the Dam is a ministerial act that is not subject to NEPA (*id.* at A30-A34).

The government stated on appeal that an administrative determination had been made not to prepare a site-specific EIS on the operation of Glen Canyon Dam. Instead, a policy decision had been reached to prepare a comprehensive, basin-wide EIS which, *inter alia*, would evaluate the operation of all the Water and Power Resources Service projects on the Colorado River and its tributaries. The court of appeals found these decisions to be reasonable and affirmed the rejection of petitioners' NEPA claims (Pet. App. A60-A66).

The comprehensive EIS proposed by Interior has been the subject of litigation. See *Environmental Defense Fund* v. *Higginson*, No. 80-1123 (D.C. Cir. May 15, 1981); *Utah* v. *Andrus*, 636 F. 2d 276 (10th Cir. 1980). Moreover, Congress has refused to appropriate funds for the preparation of the comprehensive EIS. In March 1981, the Interior Department decided against renewing efforts to obtain appropriations for preparation of the EIS. Notice of this policy decision has been sent to counsel for petitioners and to the court of appeals.

action creates a burden on the exercise of petitioner's religion and, if so, whether the government has established an interest of sufficient magnitude to outweigh the interest sought to be protected under the Free Exercise Clause (Pet. App. A44-A45).

The court first addressed petitioners' complaint that the water in Lake Powell has risen to a level that drowns a prayer spot and a spring sacred to petitioners. The court noted that uncontroverted evidence established that the storage capacity of the lake would be halved if the surface level were dropped to alleviate the alleged infringement, which would significantly reduce the water available for use in the Upper Colorado River Basin states. In these circumstances, the court of appeals concluded that the government interest must prevail (Pet. App. A46-A48).

Turning to petitioners' objections to the management of Rainbow Bridge National Monument by the Park Service, the court of appeals noted that petitioners' claim did not fall within the generally recognized categories of Free Exercise Clause violations because they alleged neither government compulsion to violate the tenets of their beliefs nor the conditioning of a benefit or a right on renunciation of a religious practice. Rather, the claim was grounded on actions of tourists at the Monument (Pet. App. A51-A52).

The court rejected this claim (Pet. App. A52-A56), finding that petitioners' attempt to compel the Park Service to exclude tourists from the Monument or to regulate their behavior in a certain manner sought "affirmative action by the government which implicates the Establishment Clause of the First Amendment" (*id.* at A52). In this connection, the court noted that the existing Park Service regulations concerning the behavior of visitors to the Monument satisfy many of petitioners' concerns, and that public assembly permits are available to petitioners for conducting religious ceremonies (*id.* at A57-A58).

ARGUMENT

Petitioners contend (Pet. 18-40) that the existing management of Rainbow Bridge National Monument by the National Park Service violates their constitutional right to free exercise of religion.[5] As the court of appeals suggested (Pet. App. A51-A52), petitioners' Free Exercise claims are most unusual in that they do not assert either that they have been denied access to the Monument or that government agents or regulations directly interfere with or impede their religious ceremonies. See *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). Nor do petitioners claim that they are discriminated against by the Park Service. Public assembly permits are available for gatherings at the Monument (see 36 C.F.R. 2.21), and petitioners may apply for such permits when they desire special access to the Monument for religious purposes.[6] See, *e.g.*, *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); see generally *O'Hair* v. *Andrus*, 613 F. 2d 931, 937 (D.C. Cir. 1979).

Petitioners' primary claim is that the Park Service management of the Monument infringes the free exercise of their religion because it allows other citizens to use the Monument for secular purposes. They object to the number

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[5]Petitioners appear to have abandoned in this Court their contention that maintenance of the present water level in Lake Powell violates their First Amendment rights. See Pet. 19 & n.11. In any event, this contention was correctly rejected below for the reasons stated by the court of appeals at Pet. App. A46-A48. See also *Sequoyah* v. *Tennessee Valley Authority*, 620 F. 2d 1159 (6th Cir.), cert. denied, No. 80-284 (Nov. 3, 1980).

[6]As the court of appeals noted (Pet. App. A58), religious ceremonies could be free of the inhibitions caused by the proximity of tourists if the ceremonies were held outside of normal visiting hours. The record does not indicate that petitioners have ever sought such a permit. Thus, petitioners' contention (Pet. 28) that the presence of tourists impairs their ability to perform religious ceremonies is not ripe for review by this Court. See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967).

and conduct of tourists who visit the Monument on the ground that the tourism results in a desecration of the sacred ground, and seek to compel the Park Service to restrict the rights of the public on this government property. This contention fails to allege any "coercive effect" on "the practice of the [Navajo] religion" (*Abington School Dist.* v. *Schempp*, 374 U.S. 203, 223 (1963)), and the court of appeals correctly held that the Free Exercise Clause does not require the Park Service to alter its regulation of public access to the Monument. See Pet. App. A56-A57.

Consideration of petitioners' claims by the lower courts was complicated by petitioners' failure to articulate the specific relief they felt was necessary to alleviate the First Amendment violation. The complaint asked for an injunction to require the officials to issue unspecified rules and regulations to protect their religious interests. Petitioners' memorandum in the district court merely suggested that unspecified "less drastic measures" than lowering the water level of Lake Powell might be available to satisfy their religious interests (Pet. 14-15 n.7). Finally, on appeal, petitioners claimed that they were attempting to establish their right to "some accommodation" and suggested some measures that might mitigate the claimed burden placed on the exercise of their religious beliefs by tourist use of the Monument. These suggestions, however, did not purport to be an exhaustive list of the changes petitioners desire. In these circumstances, contrary to petitioners' suggestion (Pet. 16), the court of appeals acted properly in focusing on the specific suggestions made by petitioners on appeal rather than speculating on other changes that could be made in the management of the Monument (Pet. App. A54-A59).[7]

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[7]For example, petitioners submit that the court of appeals should have considered all measures that would prohibit "sacrilegious activity" (Pet. 20), which would have left for the courts' determination matters of religious dogma that are outside their purview. Cf. *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 445-446 (1969).

Moreover, the court of appeals correctly stressed the interests that conflict with petitioners' desire to keep the Monument free from intrusions. Cf. *Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972). Rainbow Bridge National Monument is government property declared to be an object "of historic or scientific interest * * *." 16 U.S.C. 431.[8] Congress has charged the Park Service with the duty to manage Parks and Monuments to provide for their enjoyment "by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. The interests of tourists and preservation are fundamental guides for the Park Service. See H.R. Rep. No. 700, 64th Cong., 1st Sess. 3 (1916); H.R. Conf. Rep. No. 1136, 64th Cong., 1st Sess. 2 (1916). Thus, the court of appeals correctly found that "the government has a strong interest in assuring public access to this natural wonder" (Pet. App. A52-A53). To elevate petitioners' religious interest in shielding the Monument from tourists over the public interest in access would convert the Monument into an area maintained by the government primarily for religious purposes, which would raise serious Establishment Clause problems.

Instead, the Park Service has been delegated the responsibility to manage Rainbow Bridge National Monument in

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[8]The land comprising the Monument has been the property of the United States since the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922. Although the area of the Monument, known as the Paiute Strip, was withdrawn briefly for Reservation purposes from 1884 to 1892, it was part of the public domain when the Monument was created in 1910. Land surrounding the 160-acre Monument was added to the Navajo Reservation by the Act of Mar. 1, 1933, ch. 160, 47 Stat. 1418. In 1958, Congress authorized an exchange of reservation lands contiguous to the Monument and Lake Powell for other federal lands. Act of Sept. 2, 1958, Pub. L. No. 85-868, 72 Stat. 1686. Thus, the Monument has never been part of the Navajo Reservation, and the United States has no trust responsibility to manage the Monument for the benefit of the Navajo Nation.

the public interest, which may require a balancing of competing policies. Of course, the Park Service may accommodate petitioners' religious needs to some extent without violating the Free Establishment Clause.[9] But the proper forum for that accommodation is an administrative one. Petitioners can apply for public assembly permits to conduct religious services, and they can seek changes in Park Service regulations. These measures may suffice to alleviate some, or all, of petitioners' concerns.[10] However, the First Amendment does not compel the Park Service to restrict public access to public property as petitioners request. The Free Exercise Clause is not violated simply because petitioners find offensive the manner in which tourists visit public sites that have religious significance for the Navajo.

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[9]Indeed, as petitioners note (Pet. 31-33), Congress has passed the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. (Supp. III) 1996, and other legislation concerning accommodation by federal agencies to the religious beliefs of Native Americans. There is no allegation that the Park Service management of Rainbow Bridge National Monument violates any of these statutes.

[10]For example, the Park Service is in the process of moving the floating marina of which petitioners have complained. Petitioners correctly note (Pet. 9) that the government erred in stating in the court of appeals that the marina had already been moved. However, the Park Service informs us that construction of a new marina, six miles away from the Monument, has begun. Completion of the new facility will depend on availability of funds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ROBERT BROADBENT, Commissioner, Water and Power Resources Service, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. INTRODUCTION

In their response to the Petition for Writ of Certiorari herein, both the federal respondents and the intervenor respondents appear to have purposefully disregarded the principal thrust of petitioners' arguments, preferring instead to mischaracterize, distort and belittle the serious Free Exercise claims that prompted this liti-

gation. In particular, neither responsive brief makes any effort to answer any of the arguments set forth under Point I of the Petition (Pet. 18-27), which discussed the striking hostility towards religious beliefs revealed in the Court of Appeals' opinion, nor, indeed, do respondents attempt to defend that opinion to any substantial degree.[1]

1/ At one point in its brief, the government suggests that while judicial relief for petitioners' claims is precluded, the Park Service could accommodate petitioners' religious needs administratively, by issuing permits for religious ceremonies and by possible changes in Park Service regulations. (Fed. Br. 9) The sham "permit" issue is addressed infra, Pt. III; of note here is that the Court of Appeals specifically held below that issuance of regulations to accommodate petitioners' religion "would seem a clear violation of the Establishment Clause" (Pet. App. A54). The Court of Appeals' opinion nowhere suggests, and appears to rule out, the possibility that the government could voluntarily accommodate petitioners in ways a court is forbidden from mandating. (See Pet. 36-37, n. 19). The government's assertion that some administrative accommodation is not only appropriate but available, thus, while on its face totally inadequate to meet petitioners' complaints, flies in the face of the Court of Appeals' holding.

As will be shown herein, the main contentions in the responsive briefs amount to little more than an effort to divert the Court's attention from the issues in this case. Petitioners' arguments stand essentially unrebutted.

II. THE GOVERNMENT'S BRIEF OVERLOOKS THE ESSENTIAL FACTUAL PREMISES UNDERLYING THIS LITIGATION

The fundamental flaw that infects the government's entire response is revealed in the government's assertion (Fed. Br. 8) that

> [t]o elevate petitioners' religious interest in shielding the Monument from tourists over the public interest in access would convert the Monument into an area maintained by the government primarily for religious purposes, which would raise serious Establishment Clause problems.

This echoes the concern of the Court of Appeals below, that were petitioners granted any relief, "the monument would become a government-managed religious

shrine" (Pet. App. A57).[2] But as petitioners noted at some length (Pet. 5-7, 29-31), and as the record shows (see, e.g., Pet. App. A45-A46), Rainbow Bridge and its environs constituted an important religious shrine long before it was declared to be a national monument, and for a full century before the creation of Lake Powell made it a popular and highly touted tourist attraction. The question here, thus, is not whether the Monument may be "converted" into a religious shrine; rather, it is whether the federal government may unilaterally take over an established reli-

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2/ As pointed out in the Petition, Pet. 32-35, esp. nn. 17-18, and the brief of amici curiae American Baptist Churches, et al., at 13-15, esp. nn. 4-7, the Park Service and other federal agencies presently manage sites and buildings utilized for religious worship by Native Americans and others, without apparent First Amendment problems.

gious shrine,[3] then manage that shrine

3/ The government and the intervenors both try to make something of the fact that when Rainbow Bridge was proclaimed to be a national monument in 1910, the area was not part of the Navajo Reservation. (Fed. Br. 8, n. 8; Int. Br. 7-8.) While the respondents' point is not material, it should be noted that the Indian Claims Commission found that by 1868, the Navajo people had established aboriginal Indian title to the northern and western slopes of Navajo Mountain, Navajo Tribe of Indians v. United States, 23 Ind.Cl.Comm. 244 (1970), and Navajo occupancy of the region obviously formed the basis for the Executive Order of May 17, 1884, that added the so-called "Paiute Strip" to the Navajo Reservation. The area encompassed by that Order included Rainbow Bridge and its vicinity. As the Intervenors concede (Int. Br., 7), the subsequent restoration of that area to the public domain in 1892 was due to a belief that it had mineral potential, not because of any lack of Navajo interest in the area. The Luckert manuscript (Pet., Ex. A, 9, 27) points out that Navajo settlement of the canyons around Navajo Mountain was spurred by the flight of many Navajos from Kit Carson and the United States Cavalry in the early 1860's. Those first settlers quickly identified the important deities in their new homelands, among them the powerful spirit beings who occupied Bridge Canyon. In short, Navajo religious interest in and use of the Rainbow Bridge area has existed without interruption for more than a century. In contrast, intensive tourist use of, and, thus, Park Service interest in, Rainbow Bridge arose only in the last fifteen years, when the waters of Lake

solely for the benefit of tourists, such that the pre-existing religious practices are prevented from continuing.

The government, the intervenors, and even the courts below, have all studiously avoided that unique aspect of this case, and have assumed that the starting point for analysis of the issues herein must be, as the government says (Fed. Br. 8), that Rainbow Bridge "is government property declared to be an object 'of historic or scientific interest . . .,'" and that if petitioners wish to hold religious services there they may apply to the Park Service for a "public assembly permit." But as

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3/(cont.) Powell reached a level that made access by power boat practical. Government responses to interrogatories submitted by plaintiffs in the District Court showed that before 1964, tourist visitation to Rainbow Bridge never exceeded 3000 annually, but had climbed to 65,171 in 1975 (the last year for which complete figures were provided). Indeed, on a single day in May, 1975, according to those responses, 1432 tourists visited the Bridge, more than the total for any year prior to 1961.

suggested in the Petition (Pet. 30) the government would hardly contend that it could unilaterally expropriate the Mormon Temple and its environs in Salt Lake City, and manage it for tourists as "an object of historic interest," to the exclusion of continued religious worship there, without raising substantial Free Exercise problems, and the idea that the congregation's objections could then be resolved by their applying for a public assembly permit for religious worship "outside of normal visiting hours" (Fed. Br. 6, n. 6) would be viewed by all as patently ludicrous, and constitutionally unthinkable.

Yet the government's entire argument is underlain by the assumption that federal assertion of dominion over Rainbow Bridge is constitutionally immune, and that petitioners' Free Exercise rights must not impair what the government seems to regard as the government's "fundamental" interest

in allowing tourists to tramp all over Rainbow Bridge. Petitioners submit that to sustain such a position would leave every place of religious worship in the nation exposed to a limitless power of expropriation by government, that would make a mockery of the Free Exercise Clause. Cf. Pillar of Fire Church v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250 (1973)(religious belief may invest a building with religious significance such that condemnation for public purpose would offend the Free Exercise Clause); Westchester Reform Temple v. Brown, 22 N.Y.2d 488, 239 N.E. 2d 891 (1968)(Free Exercise Clause mandates limitations on police power restrictions, such as zoning ordinances, as applied to religious structures).

III. THE "PERMIT" ISSUE RAISED BY THE GOVERNMENT IS WHOLLY SPECIOUS.

The government argues, for the first time in the seven years this case has been

in litigation, that petitioners' claim that federal management of the Monument interferes with their religious practices and beliefs "is not ripe for review by this Court," because petitioners have never applied for a public assembly permit under which they might hold their ceremonies (Fed. Br. 6, n. 6). This assertion of unripeness was prompted by a passage in the Court of Appeals' opinion (Pet. App. A58), in which that Court suggested that petitioners' problems could be resolved by the issuance of a permit "to permit access after normal visiting hours when privacy might be assured."[4] As noted in the Petition (Pet.

4/ It must be emphasized that this remark is mere speculation by the Court of Appeals, since there has never been any factual hearing on the question of how petitioners' Free Exercise rights could be protected in these circumstances. It could be shown at such a hearing, for example, that there is no such thing as "normal visiting hours" at Rainbow Bridge. The floating dock at the Monument affords private boats a place for overnight mooring, and radios, tape decks and loud parties blare long in-

17, n. 8), this facile suggestion hardly addresses the extent or severity of the infringements petitioners' religious practices have suffered, even as described by the Court of Appeals (Pet. App. A46), and on its face the permit regulation cited by that Court, 36 C.F.R. §2.21(a) would appear to be inapplicable to this situation, as it refers only to "[p]ublic meetings, assemblies, gatherings, demonstrations, parades and other public expressions of views" (emphasis added). An essential aspect of petitioners' complaint is that their ceremonies are private affairs, which are not and cannot be held in public places.

This Court, moreover, has traditionally looked askance at government permit require-

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4/(cont.) to the night throughout the boating season in Bridge Canyon (as at all the other highly prized mooring places along Lake Powell's generally inhospitable shoreline).

ments for the exercise of First Amendment rights, see, e.g., Village of Schaumburg v. Citizens For A Better Environment, ____U.S. ____, 100 S.Ct. 826 (1980); First National Bank of Boston v. Belotti, 435 U.S. 765 (1978); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cantwell v. Connecticut, 310 U.S. 296 (1940), particularly where such requirements appear to allow the permitting official broad discretionary power. The regulation cited above might appear to be facially unobjectionable, but earlier in this litigation the Park Service set out in great detail the terms under which petitioners might obtain the permits on which the government now places such weight in its brief. In an Order entered on October 26, 1975, the District Court reported on the progress of the settlement negotiations that had commenced soon after the complaint was filed and that had, by then, run their course. The issuance of permits

for Navajo religious ceremonies had been a subject of discussion in those negotiations, and the government's final, magnanimous offer on that subject was set forth in paragraph 5 of the District Court order:

> 5. The defendants agreed, upon ninety days written notice, to close the Monument to tourist traffic from the existing courtesy dock for up to two daylight hours and during the night to permit persons approved by the plaintiffs and the National Park Service to conduct religious ceremonies within the Monument so long as the ceremony would not conflict with activities of any other group having a prior valid permit or with heavy use periods.

(Emphasis added.) The requirement of ninety days written notice, alone, effectively precludes the extension of the permit privilege to Navajo medicinemen entirely, since these ceremonies are held only as requested, and are rarely scheduled even as much as two weeks in advance, and few medicinemen read or write English. The closure would not prevent intrusions

by curious tourists docked overnight at the courtesy dock, and there are no Park Service personnel stationed at the Monument to enforce privacy. The requirement that permittees be "approved" by plaintiffs and the Park Service opens up precisely the kind of discretion the cases have consistently condemned; and the proviso at the end potentially swallows up the entire offer. "Heavy use periods" could include the entire summer season, when rain-bringing ceremonies would most likely be needed.

Even were any kind of permit procedure constitutionally tolerable in this context (which petitioners deny; see discussion infra), the conditions proposed in the instant case are so obviously unsatisfactory as to render unnecessary any effort by petitioners to go through the motions of complying. The application of such terms to the exercise by petitioners of their traditional religious practices at

Rainbow Bridge would, indeed, aggravate, not alleviate, the violations of petitioners' Free Exercise rights already evident.

Finally, however, the very concept of requiring permits for petitioners' ceremonies assumes the legitimacy of the government's takeover of Rainbow Bridge and subsequent regulation of Navajo religious activity there. (See Pt. II, supra.) The facts of this case, particularly in light of the government's brief, squarely raise the question of whether the government may attempt to impose any regulation whatever on the religious activity of Navajos at Rainbow Bridge. Petitioners and their ancestors have uttered their prayers and chants to the deities in Bridge Canyon for generations, since long before any white man ever saw the area. Those age-old rituals, and the beliefs they embody, surely need not be sacrificed to the

government's interest in creating tourist attractions, if the Free Exercise Clause means anything in this context.

IV. THE DEPRECATION BY THE RESPONDENTS OF PETITIONERS' CLAIMS OF FREE EXERCISE VIOLATIONS, IS FULLY REBUTTED BY CASE LAW AND THE RECORD HEREIN

The government attempts to belittle the severe religious oppression it has caused petitioners, saying that since petitioners do not allege any direct government interference with their ceremonies or outright denial of access to the Monument, but complain primarily about effects of tourist activity, they have alleged no "'coercive effect'" on the practice of their religion. (Fed. Br. 7, quoting Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963).) The intervenors observe that petitioners do not allege "that they have been persecuted or prosecuted under any act of Congress because of their religious beliefs" (Int. Br. 13). Obviously,

direct governmental interference with religious ceremonies, denial of access to religious shrines, and persecution and prosecution for one's religious beliefs, would clearly offend the Free Exercise Clause. But the cases in this Court under that Clause have never required a showing of such gross oppression of religion before relief is warranted.

Just two months ago, in Thomas v. Review Board, ____U.S. ____, 49 U.S.L.W. 4341 (April 6, 1981), this Court held that for a state merely to put an individual to the choice of participation in a public welfare program or adherence to his religious beliefs, even where those beliefs may be somewhat personal and idiosyncratic, violates the Free Exercise Clause. In that case, Eddie Thomas did have a choice -- that is, he could continue to act in accordance with his beliefs, and merely forego unemployment benefits from the state.

Petitioners here have no such option. The oppression they have suffered is absolute. There is only one Bridge Canyon in their pantheon, only one Rainbow Bridge. Thomas surely precludes any debate as to whether a Free Exercise violation is revealed in this record, despite the representations of the government and the intervenors. Navajo gods and shrines of major religious significance have been destroyed by the waters of Lake Powell.[5] The government's

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5/ The government makes the astonishing assertion (Fed. Br. 6, n. 5) that '[p]etitioners appear to have abandoned in this Court their contention that maintenance of the present water level in Lake Powell violates their First Amendment rights." The creation of Lake Powell is the primary cause of all of the Free Exercise violations complained of here, and petitioners have asserted that quite vigorously in their Petition. (Pet. 3, 10, 11, 12, 14, n.7, 19, n.11) Both courts below, however, concluded that even if such a violation had been caused by the Lake (which those courts declined to decide), the federal interest in maintaining the Lake at its designed level is so compelling as to justify whatever inroads on petitioners' beliefs thus necessarily resulted. Petitioners acknowledge that the federal interest is appar-

highly successful campaign to make Rainbow Bridge a major tourist attraction (Pet. 9, n.2, supra)[6] has, predictably, resulted in Navajo religious ceremonies being interrupted, or prevented from being held, and Navajo medicinemen becoming discouraged

5/ (cont.) ently very lofty; but they do not concede that the analysis of even that issue by either court below was at all in keeping with the requirements of Free Exercise adjudication, particularly since neither court was willing to acknowledge the existence of a constitutional violation in the first place.

6/ The Government now concedes that Rainbow Marina is still in place, (Fed. Br. 9, n. 10), but claims that construction of a new marina nearby "has begun." Completion of that facility, however "will depend on availability of funds." Ibid. One cannot assume, thus, that the aggravation of the constitutional violations complained of herein attributable to the Marina (as shown by the record, Depo. of Temple Reynolds, 33) will necessarily be eliminated in the foreseeable future. And to be sure, the dock at the Monumenent remains, beckoning tour boats and hundreds of private powerboats daily. (See, Pet. 20, n. 13)

even from attempting to hold ceremonies at or near Rainbow Bridge.[7]

Petitioners here have suffered violations of their Free Exercise rights of a severity rarely seen in American courts. The government's statement that its actions have had no "coercive effect" on Navajo religion, in the face of even the limited record in this case, is utterly fatuous.[8]

7/ See Answers to Interrogatories 5(p) and 5(q) by petitioners Lamarr Badoni, Teddy Holiday, Jessie Yazzie Black, Navajo Mountain Chapter (Robert Tallsalt) and Inscription House Chapter (Buster Hosteen Nez). Petitioner Jimmy Goodman, in response to Interrogatory 5(s), reported hearing of an incident in which park rangers told a group of Navajos who had gone to the Bridge for an overnight ceremony that they could not stay there. Though hearsay, the report is entirely consistent with the government's repeated suggestion that petitioners must obtain permits to hold their ceremonies at the Monument. And it is indicative of the very kind of "direct interference" with Navajo religious observances by federal agents that the government contends is absent from the allegations in this case.

8/ Similarly, the government's remark that petitioners have alleged no violation of the American Indian Religious Freedom Act (AIRFA), Pub.L. 95-341, 92 Stat. 469 (1978)(Fed. Br. 9, n. 9), must be disre-

V. CONCLUSION

For the foregoing reasons, and those stated in the Petition herein, the Writ of Certiorari should be granted.

Respectfully submitted,

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8/ (cont.) garded. That Act directed federal agencies to exercise special care to insure that the Free Exercise rights of Native Americans are not impaired by federal actions. To the extent this case alleges that federal actions have infringed on the Free Exercise rights of petitioners, it necessarily implicates federal violations of AIRFA.

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No. 80-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

LAMARR BADONI, et al., *Petitioners,*
v.
R. KEITH HIGGINSON, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF AMERICAN BAPTIST CHURCHES IN THE U.S.A., CENTER FOR CONSTITUTIONAL RIGHTS, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, EASTERN BAND OF CHEROKEE INDIANS, KOOTENAI TRIBE OF IDAHO, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., SISSETON-WAHPETON SIOUX TRIBE, UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, UNITED METHODIST BOARD OF CHURCH AND SOCIETY, UNITED PRESBYTERIAN CHURCH IN THE U.S.A., and the ZUNI TRIBE OF NEW MEXICO, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 80-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

LAMARR BADONI, et al., Petitioners,

v.

R. KEITH HIGGINSON, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE AMERICAN BAPTIST CHURCHES IN THE U.S.A., CENTER FOR CONSTITUTIONAL RIGHTS, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, EASTERN BAND OF CHEROKEE INDIANS, KOOTENAI TRIBE OF IDAHO, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., SISSETON-WAHPETON SIOUX TRIBE, UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, UNITED METHODIST BOARD OF CHURCH AND SOCIETY, UNITED PRESBYTERIAN CHURCH IN THE U.S.A., and the ZUNI TRIBE OF NEW MEXICO, FOR LEAVE TO FILE AMICI CURIAE BRIEF

The following parties respectfully move this Court for leave to file a brief as amici curiae, submitted herewith, in

support of the petition for writ of certiorari filed by the Navajo Indian petitioners (appellants below): The American Baptist Churches in the U.S.A.; Center for Constitutional Rights; Confederated Salish and Kootenai Tribes of the Flathead Reservation; Eastern Band of Cherokee Indians; Kootenai Tribe of Idaho; National Council of the Churches of Christ in the U.S.A.; Sisseton-Wahpeton Sioux Tribe; United Church of Christ Commission for Racial Justice; United Methodist Board of Church and Society; United Presbyterian Church in the U.S.A.; and the Zuni Tribe of New Mexico.

1. This is the first case to present this Court with an opportunity to review the question of the extent of the federal government's duty when it acquires lands containing religious properties to accommodate pre-existing religious practices in a manner that is consistent with the

requirements of the Religion Clauses of the First Amendment. This case presents not only important questions regarding the tension between the Religion Clauses of the First Amendment when the federal government sets aside Indian lands containing religious shrines for public use, but also implicates the free exercise rights of all religious denominations in America who worship in facilities which are presently managed by the federal government.

2. In the decision below, the Court of Appeals held that the Establishment Clause precludes any government accommodation of religious interests in religious properties located on lands which it has set aside for scientific and recreational purposes. Because the federal government is responsible for a large number of churches and other religious properties in its capacity as the largest landholder in the nation, the opinion below not only

failed to recognize religious realities of modern life, but has placed in jeopardy the religious freedom of Amici and all members of other religious denominations who worship in facilities managed by the federal government.

3. The movant national church organizations represent well over 15,000 congregations on matters pertaining to their relationship with the federal government and its agencies as it affects churches and affiliated agencies engaged in religious activities. The religious interest of more than 56 million citizens are represented by the movant church organizations. Many of these citizens worship in facilities managed by the federal government as listed partially in Exhibit A of the annexed brief, and have religious interests directly and adversely affected by the decision below. While some of the Amici church organizations, such as the United Presbyterian

Church in the U.S.A., do not have churches located on federal lands, they have involved themselves in a wide range of cases where constitutional religious freedoms have been threatened and believe that the principle of religious liberty is jeopardized by the decision below.

4. The Center for Constitutional Rights (CCR) is a non-profit tax-exempt legal and educational corporation dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. The CCR has litigated on behalf of the Native Americans and other citizens who turn to the courts to protect their First Amendment rights to freely exercise their religious beliefs. For these reasons, CCR is particularly concerned about the serious constitutional issue raised in this case.

5. With a tribal membership totaling more than 27,000 Indians, the movant Indian

tribes are federally recognized tribes which have traditionally worshipped at tribal religious shrines and sites located on lands which are now managed by the federal government. If the federal government is precluded by the Establishment Clause, as interpreted in the court below, from accommodating necessary religious observances, the religious freedom of these tribal members will be nullified on a national scale.

6. The annexed amici curiae brief contributes a valid dimension and helpful perspective on the need to grant the Navajos' petition for writ of certiorari.

7. Counsel for the moving parties has sought the consent of all counsel of record to file the accompanying amici curiae. Counsel has obtained consent from the petitioners but was unable to secure unanimous consent from respondents.

For the foregoing reasons, the moving parties request this Court to grant them leave to file the accompanying amici curiae brief in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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PARTIES TO THE PROCEEDING

The parties to the Court of Appeals proceeding are as follows: The plaintiffs-appellants (Petitioners here) are Lamarr Badoni; Teddy Holiday; Jessie Yazzie Black; Jimmy Goodman, Begay Bitsinnie; Shonto Chapter of the Navajo Nation; Navajo Mountain Chapter of the Navajo Nation; and Inscription House Chapter of the Navajo Nation. The defendants-appellees (Respondents here) are as follows: R. Keith Higginson, Commissioner, Bureau of Reclamation; Ronald H. Walker, Director, National Park Service; and Cecil D. Andrus, Secretary of the Interior. The defendants in intervention-appellees are as follows: State of Utah; Central Utah Water Conservancy District; Colorado River Conservation District; Southwestern Water Conservation District; and State of Colorado.

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BRIEF OF AMICI CURIAE AMERICAN BAPTIST CHURCHES IN THE U.S.A., et al., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTEREST OF AMICI CURIAE

This action was brought by Navajo Indian religious practitioners who worship at certain traditional Navajo religious shrines located at the Rainbow Bridge National Monument, within the boundaries of the Navajo Indian Reservation. Rainbow Bridge and a nearby spring, prayer spot,

and cave "have held positions of central importance in the religion of some Navajo people living in that area for at least 100 years." (Petitioners' Appendices, p. A-45, hereinafter "App."). In 1910 this area was set aside by Executive Order No. 1043 for scientific and recreational purposes. 36 Stat. 2703 (1910). The Navajo plaintiffs alleged that since the date the United States set aside the Rainbow Bridge area as a National Monument, Respondent National Park Service has taken a number of actions that have directly infringed upon central Navajo religious observances which predate the creation of the area as a National Monument. The complaint sought relief that would, inter alia, provide for a measured accommodation of plaintiffs' free exercise of religion. (App. pp. A-49, A-50). The trial court's dismissal of the action was affirmed by the Court of Appeals, and the Navajos seek

review of the Court of Appeals decision by this Court. Amici support the Navajo petition for writ of certiorari for the reasons set forth below.

The Court of Appeals' opinion recognized that the area of the Rainbow Bridge National Monument contains a number of irreplaceable Navajo religious shrines and that actions of the National Park Service have interfered with important religious observances of Navajo Indians. (Id., pp. A-45-46). However, in a disturbingly rigid interpretation of the Establishment Clause, the Court held that relief to accommodate Navajo religious practice was unavailable. As will be discussed, the opinion below is in direct conflict with applicable opinions of this Court, conflicts with decisions of other Circuits, and raises profound questions of national policy that necessitate review by this Court.

Amici represent over 56 million religious practitioners, several affected Indian tribes, and other citizens who turn to the courts for protection of their free exercise of religion. In these capacities, Amici are deeply concerned about the implications which the decision below has on the free exercise of religion at religious properties managed by the federal government.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW IS IN DIRECT CONFLICT WITH OPINIONS OF THIS COURT AND IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

This case presents a situation similar to that on military reservations, which has not yet been passed on by this Court, where the government regulates the temporal and geographic environment of individuals to a point that, unless the government accommodates voluntary religious services

to be conducted on public lands, citizens would be unable to engage in the practice of their faiths. School Dist. of Abington v. Schempp, 374 U.S. 203, 225, n.10 (1963). When the federal government sets aside land within an Indian reservation that contains Indian religious shrines for public use as a National Monument, does the Establishment Clause then preclude the government from managing the National Monument in a manner that accommodates the pre-existing Indian religious practices? Amici urge that in the unique circumstances of this case, the Free Exercise Clause compels government accommodation of Navajo religious needs and realities, and so long as this accommodation goes no further than required by this principle, there is no violation of the separation required by the Establishment Clause. This zone of required accommodation has previously been recognized by this Court to be consistent

with the Establishment Clause. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

The controlling issue of this case centers upon the well-known tensions between the Religion Clauses of the First Amendment and the correct approach to find a neutral course between the two Clauses. Walz v. Tax Comm'n of New York, 397 U.S. 664, 668-69 (1970). The court below failed to achieve a neutral course between the Free Exercise Clause and the Establishment Clause, in direct conflict with the opinion of this Court in Walz, supra. Instead, it gave an absolute interpretation to the language of the Establishment Clause and failed to consider the values protected by the Free Exercise Clause. This failure to reach a neutral course has created a "loophole" in First Amendment protection not countenanced by this Court.

The decision below also creates a split of opinion between the Circuits regarding the approach to reconcile the tension between the Religion Clauses in a neutral manner. See, O'Hair v. Andrus, 613 F.2d 931, 935 (D.C.Cir. 1979); Brashich v. Port Auth. of New York, 484 F.Supp. 697, 703-704 (S.D.N.Y. 1979); aff'd, 628 F.2d 1344 (2d Cir. 1980)(unpublished opinion); Anderson v. Laird, 466 F.2d 283, 288-91 (D.C.Cir. 1972), cert. den., 409 U.S. 1076 (1972).

Additionally, the decision below conflicts with opinions of this Court because it refused to consider the American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469, codified in part at 42 U.S.C. § 1996. (App., pp. A-59, A-60). This Act establishes federal policy determinative of the issue at bar. Since the Act was in effect at the time the Court of Appeals rendered its decision,

the court erroneously failed to apply the law in effect at the time it rendered its decision, Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969), even though the law was passed after the trial court decision. Ziffrin, Inc. v. United States, 318 U.S. 73, 78 (1943).

II. THE DECISION BELOW UNDERCUTS CONGRESSIONAL POLICY TOWARDS INDIANS UNDER THE FIRST AMENDMENT AND RAISES URGENT QUESTIONS OF POLICY REGARDING FEDERALLY MANAGED RELIGIOUS PROPERTIES.

There are compelling reasons of policy that mandate review of the decision below. As government regulation and activities have increased and extended into so many spheres, it becomes increasingly necessary to interpret the Establishment Clause in light of the "complexities of modern life." Walz v. Tax Comm'n of New York, supra, 397 U.S. at 676. Over the years, this Court has acknowledged that

the complexities of modern life and increased governmental activity have transformed the once "high and impregnable" wall of separation between church and state, Everson v. Board of Education, 330 U.S. 1, 18 (1947), into a "blurred, indistinct and variable barrier," Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), where "total separation [between church and state] is not possible in the absolute sense." (Id. at 614).

The federal government is the largest landowner in the nation and presently manages a large number of religious properties. Respondent National Park Service alone manages public lands containing 121 religious sites.1/ If after acquiring

1/ Attached as Exhibit A is a list of church properties located on National Park Services areas compiled from information supplied to petitioners' counsel by the Park Service pursuant to a Freedom of Information Act request. The vast majority of these churches are still in use and most, if not all, engage in religious practices that require and do receive government accommodation.

lands containing religious property, the federal government is precluded from accommodating the pre-existing religious practices of affected denominations, then the free exercise rights of Amici and all other members of religious denominations are substantially endangered.

Our system of jurisprudence has recognized that religious faith and tradition can invest certain structures with significance which deserves First Amendment protection, Pillar of Fire v. Denver Urban Renewal Authority, 509 P.2d 1250, 181 Colo. 411 (1973), and that a church member has a personal right in his place of worship which is implicit in the Free Exercise Clause, Ashworth v. Brown, 198 So. 135, 240 Ala. 164 (1940). This recognition extends to American Indian religious sites which serve important religious functions. Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980), cert. den., ___ U.S. ___

(1980). And, for those religious structures and sites which have unique religious significance, their loss goes "far beyond the incidental burden of moving to a new location." Pillar of Fire v. Denver Urban Renewal Authority, supra at 1254.

Consistent with this recognition, Congress has acknowledged that many Indian religious sites have unique religious significance and are irreplaceable. American Indian Religious Freedom Act, supra, 42 U.S.C. § 1996. This is particularly true of the Navajo shrines within the Rainbow Bridge Monument. (App., p. A-45-46.)

It is critical as a matter of national policy for this Court to define and protect a zone of required accommodation in the area of government managed religious properties that is consistent with both Religion Clauses of the First Amendment. In chartering a neutral course between the

Religion Clauses in this case, it is important to consider the congressional treatment of Indians under the First Amendment.

As in so many other areas of everyday life, 2/ Congress has used its plenary power over Indian affairs to enact special, comprehensive Indian legislation under the First Amendment. "This Court has held it permissible for Congress to accommodate free exercise values through legislation, Gillette v. United States, 401 U.S. 437, 453 (1971), and Congress has exercised its discretion to accommodate religion in many diverse areas. 3/ In legislation pertaining to Indians, Congress has recognized their unique religious needs and enacted a

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2/ See, generally, Title 25 of the United States Code.

3/ For example, see, Social Security Act, 26 U.S.C. §§ 1402(d) and (G) (1968); Military Selective Services Act of 1967, 50 U.S.C. App. § 456(j) (1967); Compensatory Time Off for Religious Observances, 5 U.S.C. § 5550a (1978).

series of laws to accommodate them. A review of this sui generis legislation demonstrates that the unique condition of American Indians must be considered when weighing the values protected by both Religion Clauses. For example, several statutes authorize the Secretary of the Interior to convey Indian trust land to "any religious society" for "religious or educational work among the Indians," 25 U.S.C. § 348. 4/ Access to nearby churches and church-sponsored schools is necessary for religious and educational reasons for Indians living on remote reservations. In Quick Bear v. Leupp, 210 U.S. 50 (1908), this Court upheld the use of Interior Secretary trust powers to support a sectarian school, when failure to do so would implicate Indian free exercise rights.

4/ See also, 25 U.S.C. §§ 280, 280a, 278a; 36 Stat. 781, 814 (1909).

In other areas, Congress has exempted the application of conservation laws to Indians when necessary to accommodate religion, 5/ and guaranteed access to religious areas located on public lands to accommodate tribal religion. 6/ In some instances, Congress has returned lands from the public domain to tribes in order to accommodate sincerely held religious beliefs. 7/ These enactments demonstrate

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5/ See, Bald Eagle Protection Act, 16 U.S.C. § 668(a) (1962).

6/ 16 U.S.C. § 281i(c) guarantees Havasupai Indians access to religious areas in the Grand Canyon National Park. 25 U.S.C. §§ 640d-19, 640d-20 guarantees Navajo and Hopi access to religious shrines located in a disputed area between the Navajo and Hopi Reservations.

7/ 84 Stat. 1437, Pub.L. No. 91-550 (1970) conveyed Blue Lake and surrounding lands to Taos Pueblo for religious ceremonials and other traditional uses. 16 U.S.C. § 445c(c) established the Pipestone National Monument in order to preserve this religious area for Indian religious use. See, generally, S.Rep. No. 2323, 74th Cong., 2d Sess., 7 (1936); S.Rep. No. 1065, 75th Cong., 1st Sess., 2 (1937); H.Rep. No. 1509, 75th Cong., 1st Sess., 3 (1937).

a broad congressional policy to accommodate Indian religious practices based upon an understanding of their unique religious traditions, the remote locations in which Indians live, and the important role that religious shrines often play in tribal religion.

With the enactment of the American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469, codified in part at 42 U.S.C. § 1996, Congress articulated a uniform national policy aimed at the elimination of federal infringements upon the free exercise of tribal religions. The clear intent of Congress was specifically to accommodate free exercise values for a class of citizens deemed in need of remedial relief under the First Amendment.8/ Congress issued a mandate to federal land

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8/ See, H.Rep. No. 1308, 95th Cong., 2d Sess., 2, reprinted in [1978] U.S. Code Cong. & Adm. News 1063.

managers, such as respondent National Park Service, to accommodate Indian religious practices as they relate to access to religious shrines so that Indians may continue to worship and perform necessary rites:

> "The first restrictions are denials of access to Indians to certain physical locations. Often these locations include sites -- a hill, a lake, or a forest glade -- which are sacred to Indian religions. Ceremonies are often required to be performed in these spots. To deny them access is analogous to preventing a non-Indian from entering his church or temple. Many of these sites not in the Indian possession are owned by the Federal Government and a few are on State lands. Federal agencies such as the Forest Service, Park Service, Bureau of Land Management, and others have prevented Indians in certain cases from entering onto these lands. The issue is not ownership or protection of the lands involved. Rather, it is a straightforward question of access in order to worship and perform the necessary rites.." 9/

9/ Id.

Congress also intended that Indians be afforded a degree of protection from intrusions during ceremonies which require isolation:

> "The third area of concern is actual interference in religious events. In some instances, those who interfere have good motives or are merely curious. These instances include being present at ceremonies which require strict isolation, even to the extent of circling the ceremony in small aircraft. Unlike the other areas, some of these incidents happen because of federal omissions, rather than actions. In areas where the Federal Government has a duty to act or is the only law enforcement at the site, Federal officials have failed to protect Indian religions from intrusions.
>
> In other instances, it is the Government official who directly interferes. This direct Federal interference imposes upon one religion, by Government action, the values of another. Such action is a direct threat to the foundation of religious freedom in America. It comes far too close to an informal state religion." 10/

10/ Id. at 3.

As a result of these free exercise concerns, Congress established a comprehensive federal policy that guarantees to American Indians "access to sacred sites" and "the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996. This federal policy is determinative of this case and should be accorded great weight in assessing the values protected by the Free Exercise Clause. To do otherwise, as did the court below, would render the Act a nullity. By ignoring the Act the court below severely undercut the policy of Congress with respect to American Indians under the First Amendment.

SUMMARY OF ARGUMENT

This case presents a situation where the federal government has set aside lands for public use which contain irreplaceable religious shrines, and is managing these

lands in a manner which burdens pre-existing religious practices. In denying relief under the Establishment Clause under these circumstances, the court below failed to achieve a neutral course between the Religion Clauses of the First Amendment. As such, its decision is in direct conflict with opinions of this Court, Walz v. Tax Comm'n of New York, supra, and decisions of other circuits, O'Hair v. Andrus, supra, Brashich v. Port Auth. of New York, supra.

The American Indian Religious Freedom Act of 1978, supra, establishes a federal policy which is determinative of the issue at bar. The refusal of the court below to apply this law, which was in effect at the time it rendered its decision, is clearly erroneous, Thorpe v. Housing Authority of Durham, supra; Ziffrin, Inc. v. United States, supra. The decision below should be summarily reversed and remanded on this ground.

The holding below not only directly undercuts broad congressional policy with respect to Indians under the First Amendment, but also jeopardizes the free exercise of religion by all citizens who practice their faiths at religious facilities located on federally managed lands. On a broader scale, Amici point out the danger of interpreting and applying the Establishment Clause in a manner that is out of step with modern day complexities and religious realities.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Exhibit A

CHURCHES IN NATIONAL PARK SYSTEM AREAS

CHURCH	PARK
United First Parish Church, Unitarian	Adams National Historic Site
Interdenominational (weddings)	Aztec Ruins National Monument
Cedar Pass Campground Amphitheater, Christian Ministry in the Parks Nondenominational	Badlands National Park
Cochiti, Santo Domingo and San Ildefonso Pueblo Indians	Bandelier National Monument
Nondenominational Sunday School; Public School Building	Big Bend National Park
Christian Ministry in the Parks; Community Building	Big Bend National Park
Catholic	Big Bend National Park
Trail Indian Independent Baptist Church	Big Cypress National Preserve
Sandy Flats	Blue Ridge Parkway

CHURCH (cont.)	PARK (cont.)
Christian Church of Nelson County	Blue Ridge Parkway
South Mountain Chapel	Blue Ridge Parkway
Mt. Paran Baptist	Blue Ridge Parkway
Virginia Baptist General Board (R.A. church camp) (Royal Ambassador)	Blue Ridge Parkway
Blue Ridge Baptist Church	Blue Ridge Parkway
Bethlehem Baptist	Blue Ridge Parkway
St. John's Methodist Church	Blue Ridge Parkway
Payne Creek Baptist Church	Blue Ridge Parkway
Thomas Grove Primitive Baptist Church	Blue Ridge Parkway
Lee Memorial Church	Blue Ridge Parkway
Mayberry Presbyterian Church	Blue Ridge Parkway
Blue Ridge Tabernacle	Blue Ridge Parkway
Puckett Primitive Baptist Church	Blue Ridge Parkway
Bluemont Presbyterian Church	Blue Ridge Parkway

CHURCH (cont.)	PARK (cont.)
Mt. Carroll Methodist Church	Blue Ridge Parkway
Saddle Mt. Primitive Baptist Church	Blue Ridge Parkway
Blue Ridge Baptist Church	Blue Ridge Parkway
Cool Spring Baptist Church	Blue Ridge Parkway
Sandy Flats Baptist Church	Blue Ridge Parkway
Altapass Baptist Church	Blue Ridge Parkway
Union Baptist Church	Blue Ridge Parkway
Christian Service Camp	Blue Ridge Parkway
African Meeting House; no denomination, no longer a church	Boston African-American National Historic Site
Christ Church (Old North Church), Episcopal	Boston National Historical Park
Boxley Valley Baptist Church and Community Building	Buffalo National River
Nondenominational	Buffalo National River
United Methodist Church of Jasper	Buffalo National River

CHURCH (cont.)	PARK (cont.)
Beechwood Church Community Building & Cemetery (deconsecrated Protestant church)	Buffalo National River
Navajo Indian Tribe	Canyon de Chelly National Monument
Methodist Church, NPS #508	Cape Lookout National Seashore
Christian Ministry in the parks	Carlsbad Caverns National Park
Dunwoody Community Church (mission church)	Chattahoochee River National Recreation Area
Ministerial Alliance/Interdenominational	Chickasaw National Recreation Area
Grace Episcopal Church	Colonial National Historical Park
St. Paul's Mission (Catholic)	Coulee Dam National Recreation Area
First African Baptist Church	Cumberland Valley National Seashore
Everett Church of Christ	Cuyahoga Valley National Recreation Area
Boston Community Church, Interfaith Christian	Cuyahoga Valley National Recreation Area

CHURCH (cont.)	PARK (cont.)
Valley View Village Church	Cuyahoga Valley National Recreation Area
Furnace Creek Visitor Center; nondenominational, Christian Ministry in the Parks	Death Valley National Monument
Methodist-Episcopal Church of Walpack	Delaware Water Gap National Recreation Area
Methodist-Episcopal Church of Millbrook	Delaware Water Gap National Recreation Area
Peter's Valley United Methodist Church	Delaware Water Gap National Recreation Area
Reformed Dutch Church of Bushkill	Delaware Water Gap National Recreation Area
St. John's Catholic Church	Delaware Water Gap National Recreation Area
Reformed Dutch Church of Montague	Delaware Water Gap National Recreation Area
Zion Lutheran Church	Delaware Water Gap National Recreation Area

CHURCH (cont.)	PARK (cont.)
Union Free Church, unknown denomination; Church of Our Lady of the Magnificant Roman Catholic; Fire Island Synagogue, Jewish	Fire Island National Seashore-Ocean Beach
Community House, nondenominational	Fire Island National Seashore-Cherry Grove
Church of the Most Precious Blood, Roman Catholic; St. Paul's Episcopal Church	Fire Island National Seashore-Davis Park
Community House, Catholic	Fire Island National Seashore-Fire Island Pines
Our Lady of the Sea, Catholic; St. Andrew by the Sea, Presbyterian	Fire Island National Seashore-Saltaire
Old Salem Church, Baptist	Fredericksburg & Spotsylvania County Battlefields Memorial National Military Park
Park Amphitheater, Nondenominational	Gettysburg National Military Park
Fort Baker Chapel; nondenominational, sponsored by U.S. Army	Golden Gate National Recreation Area
Fort Barry Chapel, temporarily inactive	Golden Gate National Recreational Area

CHURCH (cont.)	PARK (cont.)
Fort Mason Post Chapel, Catholic and Protestant, sponsored by U.S. Army	Golden Gate National Recreation Area
Community Building, Community Church	Grand Canyon National Park
Catholic Rectory and Chapel	Grand Canyon National Park
Shrine of the Ages Chapel, nondenominational	Grand Canyon National Park
Chapel of the Sacred Heart (Catholic)	Grand Teton National Park
Chapel of the Transfiguration (Episcopal)	Grand Teton National Park
Little Cataloochee Baptist Church	Great Smoky Mountains National Park
Big Cataloochee Methodist Church (Palmer Chapel)	Great Smoky Mountains National Park
Smokemont Baptist Church	Great Smoky Mountains National Park
Cades Cove Missionary Baptist	Great Smoky Mountains National Park
Cades Cove Methodist	Great Smoky Mountains National Park
Primitive Baptist Church	Great Smoky Mountains National Park

CHURCH (cont.)	PARK (cont.)
Camp Hill/Wesley United Methodist Church	Harpers Ferry Center
Kilauea Army Chapel, Catholic & Protestant	Hawaii Volcanoes National Park
Bethesda Baptist Church	Hopewell Village National Historic Site
Christ Church (Protestant & Episcopal)	Independence National Historical Park
Gloria Del (Old Swedes) Church, Episcopal Congregation	Independence National Historical Park
St. George's United Methodist Church	Independence National Historical Park
Kaal Kadosh Israel Cemetery, Jewish	Independence National Historical Park
St. Joseph's Roman Catholic Church	Independence National Historical Park
Rock Harbor Amphitheater, Christian Ministry in the Parks	Isle Royale National Park
Old Cathedral, the Basilica of St. Louis, King of France (Catholic)	Jefferson National Expansion Memorial National Historical Site

CHURCH (cont.)	PARK (cont.)
St. Philamena/ Catholic	Kalaupapa National Historical Park
Siloama/Protestant	Kalaupapa National Historical Park
St. Francis/ Catholic	Kalaupapa National Historical Park
Protestant Church (inactive)	Kalaupapa National Historical Park
Protestant Church (active)	Kalaupapa National Historical Park
United Methodist Church of Ely	Lehman Caves National Monument
Park amphitheaters, Christian Ministry in the Parks	Lassen Volcanic National Park
Memorial Visitor Center, Christian Ministry in the Parks	Lincoln Boyhood National Memorial
Grace Lutheran Church	Lincoln Home National Historical Site
St. Anne's Church & Rectory, Episcopal	Lowell National Historical Park
Little Hope Baptist Church	Mammoth Cave National Park
Mammoth Cave Baptist	Mammoth Cave National Park

CHURCH (cont.)	PARK (cont.)
Joppa Ridge Missionary Baptist	Mammoth Cave National Park
Good Springs Baptist	Mammoth Cave National Park
Ebenezer Baptist Church	Martin Luther King, Jr., National Historic Site
Our Lady of Lourdes Catholic Mission	Martin Luther King, Jr., National Historic Site
Various storefront churches	Martin Luther King, Jr., National Historic Site
Morfield Campground, Catholic services conducted by St. Margaret-Mary Catholic Church	Mesa Verde National Park
Morfield Campground and Far View Lodge; Christian Ministry in the Parks non-denominational	Mesa Verde National Park
Jemez Pueblo Indians	Pecos National Monument
Mt. Zion Church	Ozark National Scenic Riverways
Vedanta Society, Bhuddist	Point Reyes National Seashore

CHURCH (cont.)	PARK (cont.)
Saint Paul's Church-Eastchester, Episcopal	Saint Paul's Church National Historic Site
San Jose Mission/ Catholic	San Antonio Missions National Historical Park
San Juan Mission/ Catholic	San Antonio Missions National Historical Park
Edpada Missions/ Catholic	San Antonio Mission National Historical Park
Concepcion Mission Catholic	San Antonio Missions National Historical Park
Park amphitheaters, Christian Ministry in the Parks	Shenandoah National Park
Shiloh United Methodist	Shiloh National Military Park
Bishop's House & Chapel Russian Orthodox	Sitka National Historical Park
Platte River Campground, Frankfort Ministerial Association (nondenominational, Lutheran Pastor)	Sleeping Bear Dunes National Lakeshore
Hopi Indian Tribe	Sunset Crater National Monument

CHURCH (cont.)	PARK (cont.)
Touro Synagogue, Jewish	Touro Synagogue National Historic Site
Washington Memorial Chapel, Episcopal	Valley Forge National Historical Park
Divine Science Church (also known as Church of the Healing Christ), Protestant	Whitehaven Parkway (National Capital Region)
Yellowstone National Park Chapel, non-denominational	Yellowstone National Park
Church Bowl, Christian Ministry in the Parks	Yosemite National Park
Chapel, nondenominational	Yosemite National Park
Community Chapel, nondenominational	Yosemite National Park
Schoolhouse, nondenominational	Yosemite National Park
West auditorium, Roman Catholic	Yosemite National Park